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CONVEYANCER'S NOTEBOOK.

PLANNING AND REGISTRATION OF TITLE.

It is the lawyer's habit to content himself, where legislation is concerned, with the ills that the action of Parliament compels him to study in the form of the statute book and to leave alone proposals for legislative change. Nevertheless the recommendations of the Scott Committee and the Uthwatt Committee are such and so far-reaching that conveyancers would do well to consider them in advance. If adopted in any large measure they will bring with them, in our opinion, changes in the land law which will dwarf the significance of the Property Legislation of 1925. In saying this we do not mean to imply that to give effect to the recommendations the profession will be faced with the assimilation of a body of statute law of the size and extent of the 1925 Acts, but that the basis of our land law will be altered more radically.

Put very briefly the Scott Committee (Cmd. 6378, pp. 127; 1942, Stationery Office, price 2s.) makes recommendations (so far as they directly affect the land law) for the more or less complete control of planning of all development (or lack of it) in the non-urban areas by a central planning authority directly connected with a Minister of the Crown, and though local planning may in some form be continued it will be compulsory, not permissive. In effect this means the disappearance of private *rights* of development for which will be substituted licenced development together with certain forms of compulsory development which will involve compulsory acquisition. But these developments must involve also rights over land remaining in private ownership. For example, paragraph 168 recommends that the position of wayleaves should be examined and that gas, electricity and water supply undertakings should be put on a comparable footing. The net legal result of these changes in bulk will probably be considerable, though we should note at once that the Committee did not consider the question of nationalisation of land within its terms of reference.

With the political implications of these recommendations we are not concerned. It is the duty of the lawyers to serve the laws that the

community makes. But we may perhaps hazard the opinion, even though it be old-fashioned, that the centuries-old form of our democracy requires that these changes in the rights of the citizen should as far as possible be expressed in terms of law rather than in the administrative discretion of the Executive. It is precisely in the formulation of the new legal rights and obligations of landowners that the skilled conveyancer can assist and ought to be prepared by study to be able to assist. The past history of legislation does not encourage us in the belief that Government Departments and even those skilled and learned experts, the Parliamentary draftsmen, can be relied upon to relate satisfactorily and accurately innovations to existing principles. We also know that it is difficult to get amendments to statutes after they are passed into law. The land law with its closely woven complex of rights built up with centuries of almost casuistical logic is a peculiarly delicate framework with which drastically to interfere. Any earnest student of the 1925 legislation is aware only too painfully of this characteristic.

We may, perhaps, point these observations by reference to one specific recommendation. In paragraph 238 the Committee recommend that registration of title should be made compulsory over the whole of England and Wales and add that it is important that it should be *completed* within five years. The recommendation does not specifically refer to any particular form of registration of title, but we are left to assume that this means registration under the Land Registration Act, 1925. Even in the existing small compulsory areas there must be considerable tracts of land which have not been registered at the Land Registry by reason of the present rules governing compulsory registration, because the freehold title, which seems to be the one primarily affected by planning, will only be registered on a conveyance on sale and much land cannot have changed hands on sale since the introduction of compulsion. For the purpose of planning it would seem that the rules of compulsory registration must be altered. To our mind such an alteration alone would be insufficient for the purposes of planning because the original design met a rather different purpose and for better or for worse adopted towards certain aspects of conveyancing a view little likely satisfactorily to meet the needs of enthusiastic planners. We would particularly refer to the rules governing boundaries and overriding interests (including acquisition by adverse possession or prescription). While these matters may not affect very injuriously a purchaser, who is at least presumed to have inspected the plot with which he is concerned, their present position would seem very unsatisfactory to planning by remote control. Changes in the machinery of compulsory registration might well be used to get rid of these blemishes in the present system in so far as the substantive changes in the land law do not render them obsolete.

As it has been announced in Parliament that the Lord Chancellor has appointed a commission to investigate the practicability of the recommendation of compulsory registration, conveyancers should be on watch for the coming of their report and in the event of recommendation that it should be adopted be prepared with suggestions for amendment of the existing law.

Though not less detailed the Uthwatt Committee (Cmd. 6386, pp. 180; 1942, Stationery Office, price 2s. 6d.) is concerned with a more limited field, namely, the method of compensation in the event of wholesale planning. The report is mainly concerned with undeveloped land, or perhaps it would be more accurate to say non-urban land, since it seems a little unfair to the agricultural community to refer to all farm land as undeveloped.

The core of the proposals in this report, which in one way may affect the profession even more closely than the Scott report (apart from the proposal for registration), is the recommendation that the whole of the development rights in all undeveloped land (that is non-urban land) shall immediately be vested in the Crown subject to compensation. It is further suggested that when development takes place the freehold shall be acquired compulsorily and leased back to the person carrying out development. Compensation should be payable in respect of both these cases of acquisition, but the principles upon which this compensation should be payable are a variation on any of the existing rules for compulsory acquisition. The report contains some very valuable observations based upon the existing rules for compensation and from that aspect alone it warrants attention, but they are too detailed for mention here.

The report contains reference, but without recommendation in its favour, to proposals that instead of development rights the whole fee simple should be vested immediately in the Crown and there should be a statutory lease back to the present owner. The Committee express the opinion that should such a course be adopted the term should be for 99 years without any compensation for the freehold (paragraph 352). The opinion expressed that the " conventional term of 99 years " would be long enough not to make any appreciable difference in value to the owner of the freehold is a statement which we find difficult to understand. Had the term suggested been the equally " conventional " 999 years we could have understood it and the object of enabling forfeiture to be imposed for non-compliance with " planning " would be equally effective. The term of 99 years appears to us to be appropriate to jerry-building and a refusal to modernise or even, towards later periods in the term, adequately to maintain existing buildings which hardly consorts either with good planning or equivalence in value.

This note should be sufficient to point the revolutionary changes envisaged in our land law by these Committees. On the one hand, the position of landowners may be altered radically and no doubt new rights and liabilities in respect of land will come into being. To take a simple example, the question will arise whether compensation rights are realty or personalty—it is not improbable that they will be assimilated to capital moneys under the Settled Land Act. On the other hand, the relative position in the practical sphere of registered conveyancing and unregistered conveyancing may be changed with unexpected rapidity. In this respect we suspect that it is only a relative matter. As we see it, and as indeed a Government Committee has already reported, the change was bound to come, but most country practitioners felt that the

time so far as they were concerned was not yet. It is very unsafe to prophesy, but having in mind the needs of planning we think that the face of the matter has been altered completely. There probably will not be a long period in which land gradually goes on to the register but a short period in which wholesale registration will take place and thereafter all dealings in any particular district will be dealings with registered land. It is for this reason that we think that a thorough overhaul of the system is desirable before the landslide begins. The distinction between incorporeal hereditaments and licences should be defined in precise terms and perhaps the number of incorporeal hereditaments be cut down. Overriding interests should clearly cease to exist. Equally, if not more, important, the position of minor interests, their nature and extent should be defined and the method of dealing with them and with interests, that can be incorporated in a registered dealing but sometimes are not, should be handled firmly.

We feel that sufficient has been said in this place of these projects, but we expect to return to them, or rather aspects of them, more fully in a later issue when, perhaps, we may be more fully acquainted with the manner in which they are likely to receive the attention of the Legislature. We feel that there is little likelihood of their being dropped altogether or we should not have said so much.

Compensation under the Compensation (Defence) Act—landlord and tenant.—Attention should be called to the new Regulation 70CA under the Defence (General) Regulations, 1939, which deals with compensation under the Compensation (Defence) Act, 1939. The regulation concerns the case where compensation is payable to the lessor and not to the lessee by virtue of the Landlord and Tenant (War Damage) Acts, 1939 and 1941. It enables the compensation to be paid to the lessor direct, requiring the lessor to give notice to tenant, and it also provides for money paid to a lessee.

Stamp on assents and voluntary transfers—amendment of the law.—*Re Robbs' Contract*, [1941] 3 All E. R. 186, noted *ante*, Vol. 6, p. 52, caused some confusion and a great deal of surprise to practitioners when the Court of Appeal held that voluntary transfers, not attracting *ad valorem* duty because, *e.g.*, they were transfers on appointment of new trustees, still had to be presented for adjudication under section 74 of the Finance (1909–10) Act, 1910. The view taken by the Court of Appeal had not been the practice, and the result has been an amendment of the law by section 44 of the Finance Act, 1942. This section provides that the requirements of section 74 of the 1910 Act do not and shall be deemed never to have applied to conveyances and transfers which by section 74 (6) are exempted from *ad valorem* duty " (that is to say, certain conveyances or transfers made for securing repayments of

advances and loans or connected with trusts or not passing any beneficial interest, and certain disentailing assurances) ".

It is quite clear that the purport of this amendment, made retrospective, is to restore the position as it was generally regarded to be prior to the decision.

Land tax—rate of—redemption of.—Section 43 of the Finance Act, 1942, fixes the rate of land tax in any land tax parish for the year ending March 24, 1943, and every subsequent year at the rate fixed for the year ending March 24, 1940. It also enables any person who paid any sum in excess of this rate during the years 1941 and 1942 to recover the excess on application within twelve months from the commencement of the Act (June 24, 1942).

In respect of any contract to redeem land tax entered into on or after April 15, 1942, the amount payable shall be twenty-five times the assessment for the year ending March 24, 1940.

Farming—income tax.—Section 28 of the Finance Act, 1942, is a somewhat complicated provision in four parts of which only a general summary is possible. First, the Finance Act, 1941, s. 11 (1), specifying the cases where farming is exempted from compulsory assessment under Schedule D, is now limited to cases of £100 instead of £300 (sub-section 1), but rule 5 of Schedule B permitting farmers otherwise chargeable under B to elect to be assessed under Schedule D shall apply only to woodlands under rule 7 and not have effect in other cases as regards tax for 1942–43 or subsequent years (sub-section 3).

Secondly, the definition of " assessable value " in Schedule B shall contain the words " an amount equal to three times the annual value " in place of the words " an amount equal to the annual value " (sub-section 2).

Thirdly, there is definition of the method of carrying forward losses in connection with farming on the basis of years preceding the year 1942–43 by reference to Schedule D assessment (sub-section 4).

Fourthly, there is provision for the reduction of assessment to meet the actual profits. This appears to be limited to the year of assessment 1942–43 and does not apply to subsequent years as in the other cases summarised. This claim to reduction of assessment by reference to actual profits applies only to tax payable by " virtue of this section ". It is supposed that this means by virtue of the changes introduced by section 28, though as most of the changes are legislation by incorporating amendments into existing sections of other Acts it is not easy to arrive at this solution.

THE WAR DAMAGE (AMENDMENT) ACT, 1942.

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The War Damage Act, 1941, having been in operation for over a year, it is not surprising that an amending Act has been considered necessary. The new Act contains seven sections and four Schedules, and the Schedules require very careful consideration.

The Risk Period.—The Act of 1941 was designed to make provision for a risk period beginning with September 3, 1939, and ending with August 31, 1941, and the contributions required by the Act were intended to relate to that period. By the War Damage (Extension of Risk Period) Act, 1941, which received the Royal Assent on July 29, 1941, a "second risk period" was established, extending from September 1, 1941, to August 31, 1942. Payments in respect of war damage occurring during the second risk period were authorised, but contributions for the second risk period were not fixed, being left to be determined later by Parliament.

Section 1 of the new Act extends the risk period under the principal Act to August 31, 1942, and thereafter until it is determined by an Order made by the Treasury and approved by a Resolution of the House of Commons. The War Damage (Extension of Risk Period) Act, 1941, is repealed.

It may be assumed that unless and until the financial position renders a further contribution necessary the single risk period now established will not be determined. In any event the contributions levied under the principal Act will cover the period to August 31, 1942, and the procedure prescribed for the termination of the risk period ensures that some notice will be given before the period comes to an end. New legislation will be necessary before contributions can be levied in respect of a further risk period should the present one be determined.

Sub-sections (2) and (3) of section 1 make consequential amendments. Section 1 (2) applies the new meaning of "risk period", where applicable, to Treasury Regulations under the principal Act. Section 1 (3) deals with contributions. In ascertaining for the purposes of the principal Act whether a property is a "contributory property", it is necessary (*vide* section 19 (1)) to consider whether it was assessed at any time during the risk period. The Act (section 31) made special provision for the instalments of contribution falling due in 1941. For the purpose of ascertaining whether a property was a "contributory property", what was its contributory value, and for what purposes it was used, etc., throughout the risk period, that period was deemed to have ended on January 1, 1941. The risk period being now of indefinite duration these provisions are applied to each year, and for the purposes indicated above, relevant to the instalment of contribution in any year, the risk period is deemed to have ended on the relevant date (January 1) in that year.

Minor Amendments.—Section 2 enacts the provisions in the Schedules, which will be considered later.

Section 3 extends the provisions of the principal Act imposing penalties for false information. Sections 57 and 63 of the principal Act imposed such penalties in respect of information required by the War Damage Commission or the Board of Trade. This principle is now extended to statements made for the purpose of obtaining a payment from the Commission or under a policy, whether the information be required or not.

Section 4 authorises the postponement of the submission to Parliament of statements under section 70 of the principal Act and section 16 of the War Risks Insurance Act, 1939.

Section 5 authorises payments by the Board of Trade under the War Risks Insurance Act, 1939, otherwise than under a policy, thus extending the principle of section 68 of the Act of 1941.

The major amendments of the principal Act are to be found in the Schedules. The First Schedule is of considerable importance and its provisions must be considered in some detail.

The First Schedule.

Value of Scrap Materials.—Paragraph 1 deals with the value as scrap of materials provided for temporary works. "Temporary works payments" are made under section 5 of the principal Act in respect of the "proper cost" of works reasonably executed "for temporarily meeting the circumstances" caused by war damage. The section is a difficult one, and among other debatable points the question whether the claimant should give credit for usable materials on the site has not been made clear. This point is not deal with in paragraph 1. The position there dealt with arises when a temporary works payment is made, and later a substantive payment (cost of works payment or value payment) comes to be made. In such a case the payment is reduced by the amount of the scrap value of articles already paid for by the Commission. The Treasury are to make regulations as to the ascertainment of value, but it is important to observe that the reduction takes effect whether the substantive payment is a cost of works payment or a value payment. In the former case the application of the principle is limited to materials which become available in the execution of subsequent works, and this is clearly to be understood, as if no such provision were made the Commission might pay twice for the same materials. In the latter case there is a total loss, and it may be assumed that the principle will be applied so as to require a claimant to dispose of his temporary works materials in reduction of his claim.

Licensed Premises.—Paragraph 2 deals with licensed premises and is important. Under the principal Act the value of such premises before and after war damage may have to be ascertained for more than one purpose, *e.g.*, in computing the amount of a value payment, and in determining whether a payment of cost of works or a value payment is to be made (sections 3 and 4). For these purposes a comparison may

have to be made between the value of licensed premises in the state in which they were immediately before war damage and their value in the state in which they were immediately after the war damage. When there is serious damage the validity of the licence and its prospect of renewal might be imperilled, and in such circumstances the value of the hereditament after damage might be much less than it would otherwise have been. Paragraph 2 of the First Schedule is designed to meet this position, and the valuations are to be made on the assumption that the validity of the licence and the prospect of its renewal are unaffected by the damage. This does not mean that the licence can be ignored in valuation, as its existence has an effect on value both before and after damage, and this effect is not necessarily the same.

Calculation of Value Payment.—Paragraph 3 amends the law as to valuation of a hereditament for the purpose of calculating the amount of a value payment. This amendment brings the language of section 3 (5) of the principal Act into accordance with what is understood to have been the practice of the Commission.

Section 3 (4) of the principal Act prescribes the method of calculation of value payments, which are based on the depreciation in value caused by the war damage. Section 3 (5) provides that the value of a hereditament in the state in which it was *at any time* is to be ascertained by reference to prices current at March 31, 1939, and then proceeds to define the incidents of a notional sale in the open market on that day. These include a condition that the notional sale is to be subject to any restriction or liability imposed under an enactment to which the hereditament was subject *at that time*. The words " at that time " are not free from difficulty, as no time has been mentioned. It seems clear, however, that the words do not refer to March 31, 1939, but to " any time " referred to in the opening words of the sub-section. On this view, " any time " may be a time considerably later than the passing of the Act, and new legislation may have imposed new restrictions and liabilities, to which the hereditament may be subject. The effect of the amendment now enacted is that new legislation is to be ignored and the hereditament is only to be considered to be subject to restrictions and liabilities to which it is subject under enactments passed before March 26, 1941.

An amendment to the proviso to section 3 (5) of the principal Act omits words which seem impossible of application.

Nature of Payment.—Paragraph 4 of the First Schedule modifies the language of section 4 (1) (a) of the principal Act, which prescribed the method of determining whether a cost of works payment or a value payment is to be made in any case. It is made clear that in computing the cost of making good (the language of the replaced provision) the Commission are to consider the proper cost (see section 3 (3) of the principal Act) of works required to reinstate the hereditament in the form in which it existed immediately before the war damage.

Paragraph 4 (2) of the Schedule brings these provisions as to

calculation into line with section 3 of the principal Act, as amended by paragraph 3 of the Schedule, already discussed.

Rentcharges.—Paragraph 5 of the Schedule is a lengthy one, and its provisions are complicated in form. A new principle is introduced and it would probably serve no useful purpose to discuss the language of the paragraph in detail in such an article as this.

The principal Act made no provision for payment of any share in a value payment to the owner of a rentcharge created out of a proprietary interest in a property which sustained war damage and became a total loss. Rentcharges, under that Act, were not proprietary interests. It does, however, appear that if a building is completely destroyed and not rebuilt the owner of a rentcharge may suffer through the loss of a considerable part of his security.

Paragraph 5 is designed to remove this anomaly, if anomaly it be. A right to a share in a value payment is given to the owner of a rentcharge in certain circumstances. These are, shortly—

(a) the amount of the rentcharge (so far as attributable to land in the hereditament) must exceed the " available annual value " of that land as depreciated by the war damage;

(b) that at the material time no building sufficient to make good that excess has been carried out, or is likely to be carried out within a reasonable period.

" Available annual value " of land is defined in paragraph 5 (11). For the purposes of condition (a) it is the annual value as depreciated by war damage, less the amount of any prior rentcharge, and where the rentcharge is created out of a lease, less also the rent.

It will be seen that if the annual value of the land as depreciated by the war damage is equal to or more than the rentcharge, no right to a share in the value payment accrues to the owner of the rentcharge, and a similar result follows if a building has been, or is likely to be, erected, which will increase the annual value of the land to the amount of the rentcharge.

Paragraph 5 (2) provides for the calculation of the share of the rentcharge owner. Subject to one exception this is to be the capital value of the excess of the rentcharge over the " available annual value " of the land as depreciated. The exception occurs when the rentcharge, apart from war damage, exceeded the annual value. In such a case the last-mentioned excess must be deducted from the excess mentioned in condition (a) before the capital value is ascertained.

A further consequence follows. The owner of a rentcharge who obtains a share in a value payment cannot retain his full rentcharge and so much as is appropriated to the excess is extinguished.

The share paid to the owner of a rentcharge is to be deducted from the share of the owner of the proprietary interest out of which the rentcharge was created. Special provision is made for cases in which either the proprietary interest or the rentcharge is subject to a mortgage.

Paragraph 6 of the Schedule applies these rentcharge provisions to feu duties or ground annuals in Scotland.

Special Form of Payment.—Paragraph 7 of the Schedule replaces section 4 (2) (a) and section 16 of the principal Act, which are repealed.

Section 4 (2) (a), as originally enacted, enabled the Commission to make what is commonly known as a "hybrid payment" in cases in which a payment of cost of works would normally be appropriate, but the Commission are satisfied that the persons interested do not wish the damage or part of it to be made good. This provision is re-enacted in an amended form in paragraph 7 (1), and the Commission may now make a payment which is partly cost of works (where works have been executed) and partly a value payment.

As an example of a case in which such a hybrid payment might be appropriate one may consider the case of a tall building in which the three top floors are damaged, the upper two seriously. The interested persons may wish to reconstruct two only of these floors and use other premises for the purposes to which the original top floor was devoted. Again, in a simple case, the person who would be entitled to a cost of works payment does not wish to do the work of making good, or all of it, and he may get a value payment for what is not done.

Paragraph 7 (2) deals with compulsory purchase, before damage is made good, of a hereditament in respect of which a cost of works payment would normally be appropriate. Section 16 of the principal Act dealt with the case of compulsory purchase under an enactment passed before the principal Act.

The Agriculture (Miscellaneous Provisions) Act, 1941, s. 9 (4), provided that that Act should be deemed to have been passed before the principal Act. This provision may still be important, as section 16 of the principal Act continues to have effect in cases in which Notice to Treat was served before August 6, 1942.

The principal amendments effected by paragraph 7 (2) are that the principle of making a special form of payment applies whether compulsory purchase was authorised by an Act passed before or after the passing of the principal Act, and that the principle is extended to acquisition by agreement by a person authorised to acquire compulsorily. In these cases the making of a special payment is obligatory.

The Commission were authorised under the principal Act to make a cost of works payment in certain cases in which a value payment would normally be appropriate, *i.e.*, by section 4 (2) (b) when it seemed expedient having regard to the effect of making good in relation to the value of another hereditament, and by section 7 (3) (b) when the damage is made good in the public interest. This power is now, by paragraph 7 (4) of the First Schedule, extended to enable the Commission to make a "hybrid payment".

Consequential provision as to division of payments among owners of proprietary interests, reductions in respect of available materials, and deduction of outstanding contributions are made.

Disposal of Substituted Value Payment.—Paragraph 8 of the First Schedule deals with the disposal of value payments made in lieu of cost of works payments under the powers just discussed. This is a difficult

and complicated paragraph. The cases to which the provisions apply are those in which a payment of cost of works would have been made under section 4 (1) (a) of the principal Act if the Commission had not otherwise determined. That part of a " hybrid payment " which is a payment of cost of works is not affected and the general provisions of the principal Act (section 9 (1)) apply. That part which is a value payment is dealt with under paragraph 8.

The damaged property may have been sold, or, as has been mentioned above, may have been compulsorily acquired. In the case of sale, the disposition of the substituted value payment is regulated by the title to the hereditament at the date when the Commission determine to exercise their power. In the case of compulsory acquisition its destination is regulated by title on the date of acquisition. If there is more than one proprietary interest, the payment is apportioned in proportion to the depreciation in value of the several proprietary interests. Paragraphs 8 (2) and 8 (3) are important, because they apply not only to these substituted value payments, but also to the disposal of value payments under section 9 of the principal Act, which is to have effect as if those two sub-paragraphs were inserted in it. This appears to be the effect of paragraph 8 (4), as section 2 of the Amendment Act has already provided that the principal Act is to have effect as if originally enacted with the amendments affected by this Schedule. But section 9 (3) of the principal Act is not repealed—it is in fact amended by other provisions of the Amendment Act, and it may be that the intention of paragraph 8 (4) of the First Schedule is simply to apply the provisions of section 9 (4) of the principal Act to substituted value payments. If this was the intention of Parliament, that intention could have been very simply stated without inserting these two sub-paragraphs in section 9 of the principal Act. Possibly the intention would be held to appear from the references to " that power " and " date of acquisition " in paragraph 8 (2).

Paragraph 8 (3) is drafted in complicated and rather obscure language, but its effect is reasonably clear. It is designed to prescribe the method by which the depreciation of a proprietary interest is to be calculated, this calculation being a stage in the apportionment of a value payment. The interest is to be valued at the difference between the value which a similar interest, with the like incidents (subject to certain specified exceptions) would have had on March 31, 1939, in the state of the hereditament immediately before damage and its value on that date in the state of the hereditament immediately after damage. The " specified exceptions " are prescribed in the sub-paragraph, and two of them apply both before and after damage, *i.e.*, (a) mortgagee's charges and rentcharges, (b) statutory restrictions after March 26, 1941. These are to be disregarded. As regards valuation before damage, incidents arising under the Landlord and Tenant (War Damage) Acts, 1939 and 1941, are to be disregarded. This provision must be merely declaratory; no such incidents could possibly affect an undamaged hereditament. As regards valuation after damage, the valuation must have reference to incidents under those Acts which in fact attach to the hereditament,

This replaces the provision in section 9 (3) (a) of the principal Act, which requires such a valuation to be made with regard to what in fact happens as regards surrender, not, be it noted, to what has in fact happened. Where there has been compulsory acquisition of both landlords' and tenants' interests and a conditional notice of retention has been served, the valuation is to be treated as if the notice had not been conditional.

Paragraph 8 (5) enables the Commission to use their discretion in cases in which an agreement as to the disposal of a payment has been made during the period between the occurrence of the war damage and August 6, 1942.

Notices under Section 7.—Section 7 (2) of the principal Act authorises the Commission, for the purpose of giving effect to directions received from the Treasury for securing that payments are made in accordance with the public interest, to publish in the *Gazettes* notices requiring the person proposing to execute works of any class, or in any area, or to any class of hereditament, to notify the Commission of his proposal. Paragraph 9 of the First Schedule to the amending Act enables the Commission subsequently to release the obligation imposed by the notice under the principal Act.

Minor Changes.—Paragraphs 10, 11 and 12 of the First Schedule enact amendments of a drafting nature which do not call for detailed discussion.

Alteration of Basis of Contribution.—Paragraph 13 of the First Schedule amends section 30 of the principal Act, a rather difficult section. In general terms, payments of war damage contribution are based on the "contributory value", which in ordinary cases is the amount of the net assessment for the purposes of Schedule A on the first day during the risk period, *i.e.*, the first day after September 3, 1939, on which such an assessment was in force. Section 30 of the principal Act provides for cases of alteration in the Schedule A assessment of properties following on alterations of the area or condition of a unit of land as respects which annual values are ascertained for the purposes of Schedule A. When the assessment is altered because of an alteration of area the old assessment is to be disregarded, and future instalments will be collected on the new assessment. When the assessment is altered because of an alteration in the condition of the unit, future instalments are collected on the higher of the two assessments. In any case regard is had to the position on January 1 in any year.

In the case of war damage to a building, or to a range of buildings included in one assessment, it is sometimes difficult to determine whether the alteration is to area or to condition. This appears to be a question of fact.

Paragraph 13 tempers the general severity of the provisions of section 30 by making special provision for cases in which buildings are destroyed, demolished or otherwise. A new proviso is added to

section 30 (2), which deals with alterations in Schedule A assessments consequent upon an alteration in the condition of a unit of land. Where the alteration is caused, otherwise than by war damage, by the destruction or demolition of buildings or works then the old assessment is to be disregarded as respects the contribution for any year subsequent to 1941, notwithstanding that the new assessment is less than the old one.

Land Subject to Clearance Orders, etc.—Paragraph 14 of the First Schedule deals with houses or buildings which are subject to a clearance order made under the Housing Act, 1936, and confirmed by the Minister of Health, or to a compulsory purchase order made under that Act in respect of land in a clearance area, or under section 36 (3) of that Act, or to a demolition order which had become operative.

If the Inland Revenue Commissioners are satisfied as to those facts, and that the house or building has not been occupied in whole or in part at any time during 1942 or any subsequent year, the Commissioners are not to collect contribution for that year unless they are satisfied that there has been occupation or the order has been quashed.

Such orders as are mentioned above are not now being made, but there must be a good many outstanding to which the paragraph will apply.

Lower Rate of Contribution.—Section 20 of the principal Act, which fixed the number and amount of the instalments of war damage contribution, provided that a contributory property which consisted throughout the risk period of agricultural land, agricultural buildings, or land used for certain purposes of recreation or sport should pay a reduced annual instalment of 6d. in the £ instead of 2s. This provision is now extended by paragraph 15 of the First Schedule to land used for aerodromes, flying schools or landing grounds.

Section 21, which preserves these exemptions if land is temporarily used for war purposes, applies.

"*Fit*" *and* "*Unfit*".—Section 33 (4) of the principal Act prohibits the collection of contributions, where the Inland Revenue Commissioners are satisfied that a property is unfit by reason of war damage, until they are satisfied that it has been rendered fit. In this sub-section "fit" and "unfit" have the same meanings as in the Landlord and Tenant (War Damage) Act, 1939. New definitions are now substituted by paragraph 16 of the First Schedule for the purposes of section 33 (4) of the principal Act. The essential distinction is that a property is not now to be considered "unfit" unless it is not only unfit for the purpose for which it was used or adapted for use immediately before the war damage, but is also unfit for any other purpose substantial in relation to that user.

Provisions for Discharge of Outgoings.—The word "outgoings" is a word of wide meaning, and, no doubt, instalments of war damage contribution are outgoings in the widest sense of the word. A question much canvassed after the passing of the principal Act was whether instalments of war damage contribution were apportionable between

vendor and purchaser on an open contract of sale. This question was settled in *Re Jacobs' and Stedman's Contract*, [1942] 2 All E. R. 104, in which case it was decided by Farwell, J., that these instalments are not apportionable outgoings.

Paragraph 17 (1) of the First Schedule now deals with provisions in agreements creating short tenancies or granting licences, by which the tenant or licensee is required to discharge outgoings. Such provisions might impose on the tenant or licensee a liability to pay instalments of war damage contribution, or an indemnity, or a premium under Part II. Such provisions are to be of no effect as regards any such liability, whether the provision was entered into or imposed before or after the passing of the principal Act or the amending Act.

As regards tenancies this amendment is limited to short tenancies because these are not proprietary interests. Tenancies which are proprietary interests carry a statutory liability, and if they carry the right to possession the tenant owner of that interest is liable to pay the instalment of contribution and is entitled to a partial indemnity under section 24 and the Fourth Schedule.

Paragraph 17 (2) enacts a corresponding rule in respect of provisions in wills, settlements or other instruments (including enactments), whether executed or coming into operation before or after the passing of the principal Act or the amending Act, which provide for the discharge of outgoings out of income, or by a beneficiary under a trust. These provisions are not to have effect in relation to instalments of war damage contribution, indemnities, or premiums under Part II, unless an intention that the provisions should have that effect appears from the terms of the instrument other than the general reference to outgoings.

Contribution : Transmission of Interest.—Section 35 of the principal Act preserves rights conferred against or on any person on or against the Inland Revenue Commissioners or any other person, by virtue of the first-mentioned person being on any date the owner, or the landlord, tenant or mortgagee of the owner of an interest, notwithstanding death or transmission of interest.

These provisions are important as respects the collection of instalments of contribution. This is payable in each year of contribution on July 1 but in relation to each instalment regard is to be had (section 20 (2)) to the circumstances at the relevant date (January 1) in that year.

Paragraph 18 of the First Schedule contains drafting amendments to section 35, which are important. In the first place it is made clear that the "right" under Part I referred to is a right whether present or future. A lessee having a proprietary interest on January 1 in any year will be liable to pay the instalment of contribution due on July 1 and will be entitled to deduct the amount of the indemnity to which he is entitled from any instalment of rent falling due after he becomes entitled to recover that indemnity. It is not stated in the Act that payment of the contribution is a condition precedent to recovery of indemnity (see now paragraph 12 of the Second Schedule to the amending Act) but in

any event on January 1 the liability and the right to indemnity must be a future liability and right. The original section did not expressly provide for the death of the lessee or the sale of his interest after January 1 and before payment of the contribution and collection of the indemnity, but it is now clear that the Commissioners may collect the instalment of contribution from him or his estate, and that he or his estate will be entitled to the indemnity. By a further amendment it is made clear that the position is to be the same whether the death or transmission of interest takes place before, on or after July 1 in the material year. The case of a lessee has been chosen as an example of the effect of the amendments.

Contributions: Resort to Rent.—Paragraph 19 of the First Schedule extends the powers of the Inland Revenue Commissioners to make regulations providing for the collection of instalments of contribution (section 36 (2)) by empowering them to apply with modifications, and in relation to any class of property, Part II of the First Schedule to the Finance Act, 1941.

Church Property.—By paragraph 20 of the First Schedule it is made clear that the references to "charitable purposes" in section 39 (4) and (6) of the principal Act include ecclesiastical purposes. The words "ecclesiastical purposes" occur in section 39 (1) and the amendment repairs an obvious omission in the drafting of the later sub-sections.

Elementary Schools.—Under section 38 of the Education Act, 1921, and under corresponding sections of earlier Education Acts now repealed, the managers of non-provided elementary schools were authorised to make an arrangement with the local education authority for transferring the school to that authority. Certain consents are required. Transfers may take the form of an absolute conveyance or of a lease at a nominal rent or otherwise, or may merely give a right of user during part of the week. There is provision authorising re-transfer on payment to the local education authority of money expended on the school out of a loan raised by that authority.

It is clear that the provisions of the principal Act as to payment and ultimate incidence of instalments of contribution, and as to payments in respect of war damage have, in such cases, an effect varying with the form of the transfer. This anomaly is removed by paragraph 21 of the First Schedule, which enables the Board of Education, by Order as respects any school, and with certain consents, to direct that these provisions shall apply as if the school were vested in the local education authority.

The National Trust.—Paragraph 22 of the First Schedule repeals section 43 of the principal Act and enacts new provisions in relation to land belonging to the National Trust. These are not of general interest.

Removable Fixtures.—Section 46 (4) of the principal Act dealt with the apportionment of value payments in cases in which there was on

the hereditament, immediately before the war damage, an article which some person not having a proprietary interest in the hereditament had a right to remove and to which he would have been entitled on removing it, and made provision for the payment to that person of a share in a value payment.

By paragraph 25 of the First Schedule these provisions are extended to apply to "buildings or works" (not being articles to which section 46 (4) applies) which such a person has a right to remove or may be required to remove. Garden sheds and portable greenhouses afford examples of such buildings or works.

Definition of "War Damage."—"War Damage" is defined in section 80 of the principal Act. In addition to damage caused by the action of the enemy, or by action taken in repelling a real or imagined attack, it includes (*inter alia*) damage occurring as the direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate, the consequences of such damage. Paragraph 27, without expressly extending the meaning of "war damage", empowers the Commission, with the consent of the Treasury, to treat as war damage any physical change in land which is the direct result of measures taken under proper authority to deal with "war damage". As an example one may instance damage occurring as a result of demolition of damaged buildings by explosives.

Movable Property which is "Land."—By paragraph 29 of the First Schedule, for the purposes of the provisions of the principal Act relating to payments in respect of war damage under Part I as respects any personal chattel that is "land" within the meaning of section 95, the property in the chattel is to be treated as a proprietary interest, and the sole proprietary interest, therein.

The definition of "land" in section 95 of the principal Act is an exceedingly difficult one. It includes everything ordinarily described as "land", with certain express additions and certain express limitations. The additions are:—

(1) (Paragraph (b) of the definition) things which on a valuation for rating purposes for the time being in force made by reference to the accounts, receipts, profits or output of an undertaking, were treated as the subject of an occupation by the person carrying on the undertaking.

(2) (Paragraph (c) of the definition) certain plant and machinery which in rating law would be deemed to be a part of the land. This is limited to land not comprised in a rating hereditament which is the subject of such a valuation as is mentioned in the preceding paragraph.

These provisions are almost impossible to apply and therefore to interpret. The expression "valuation for rating purposes for the time being in force" is meaningless. No valuation is ever in force. What is in force is a valuation list, including, of course, figures indicating the annual value of each rateable hereditament. The words quoted

must be intended to refer to these figures in the valuation list, but it is next necessary to ascertain how this valuation was made. It is impossible to suggest by what means it will be proved that a valuation was made, that it was made by reference to accounts, etc., or that any particular thing on the land was treated as the subject of occupation. Failing such proof it is not obvious how a chattel can be proved to fall within this part of the definition. Moreover, apart from public utility undertakings, which are assessed on the " profits basis " as explained in *Kingston Union* v. *Metropolitan Water Board*, [1926] A. C. 331, but in respect of which payments under Part I of the principal Act are not made (*vide* section 40), in practice accounts, receipts, profit or output are commonly, but not universally, considered in connection with the valuation for rating purposes of a variety of rateable hereditaments, *e.g.*, public houses, cinemas, and coal mines, but in the majority of such cases it must be impossible to ascertain what chattels, if any, were treated as the subject of occupation, or whether the question was considered at all.

" Rateable plant and machinery " is defined with reasonable clarity by section 24 of the Rating and Valuation Act, 1925, and the Plant and Machinery (Valuation for Rating) Order, 1927 (S. R. & O., 1927, No. 480), but paragraph (c) of the definition is expressed not to apply to land included in a rating hereditament to which the previous paragraph applies.

For these reasons paragraph 29 of the First Schedule to the Act of 1942 may be difficult to apply.

Tenancies.—Paragraph 30 of the First Schedule makes two additions to the classes of tenancies included in the definition of " short tenancy " in section 95 of the principal Act (which are not proprietary interests). These are, shortly, tenancies at will and tenancies limited to expire, or terminable not later than seven years after the end of the present emergency.

The remaining paragraphs of the First Schedule effect drafting amendments or deal with subjects of little general interest.

The Second Schedule.

Contributions and Indemnities.—The Second Schedule effects amendments in the law relating to the ultimate incidence of instalments of war damage contribution. Paragraphs 1 to 6 deal with the apportionment of contributions between mortgagors and mortgagees. The provisions of the principal Act upon this point have aroused considerable criticism and the amending provisions were the subject of similar criticism during the passage of the Bill through Parliament.

Paragraph 2 makes provision for the application of section 25 of the principal Act to second and subsequent mortgages. The price of acquisition or value of the interest is to be considered free from any mortgage, and then be reduced by the aggregate of the amounts secured by all prior mortgages.

Paragraph 4 brings within the purview of section 25 mortgages of tenement and apartment houses, where these are separate contributory properties. Such a building is to be considered to be a single contributory property to which section 25 applies if each of the contributory properties therein is used or is suitable for use for residential purposes and has a contributory value not exceeding £35. A somewhat similar concession applicable to Scotland was enacted by section 96 (14) of the principal Act, for which a new sub-section is substituted by paragraph 4 (2) of the Second Schedule.

Paragraphs 7 to 11 deal with the apportionment of contributions between landlord and tenant.

Paragraph 7 (1) adds a provision to paragraph 2 of the Fourth Schedule to the principal Act, which gives a right of proportionate indemnity to intermediate tenants. The new proviso deals with cases in which the intermediate tenant is tenant of part only of the contributory property and in which the land by virtue of the tenancy of which he is entitled to indemnity from his immediate landlord is part only of the land in respect of which he is required to indemnify his sub-tenants.

Paragraph 7 (2) amends the drafting of paragraph 6 (2) (c) of the Fourth Schedule and paragraph 8 similarly amends paragraph 4 of the Fourth Schedule to the principal Act.

Paragraph 9 substitutes new provisions for those of paragraphs 1 to 4 of the Fourth Schedule to the principal Act in respect of reversionary tenancies. A liability is imposed on reversionary tenants whose tenancy is a proprietary interest in certain circumstances. There are further drafting amendments.

General Provisions as to Indemnities.—By paragraph 12 of the Second Schedule it is made clear that a right to indemnity conferred by Part I of, or the Fourth Schedule to, the principal Act is not enforceable until the liability in respect of which indemnity is claimed has been discharged. This remedies an omission in section 28 of the principal Act. Payment in part gives rise to a right of enforcement *pro tanto*.

Paragraph 13 of the Second Schedule remedies an apparent error in the drafting of section 32 of the principal Act. That section authorises the payment of contributions in advance. Any surplus beyond the sum immediately due is applied, together with the proper interest as prescribed by the section, to the discharge of future instalments as they fall due. Section 31 (1) provides that where any instalment is reduced by reason of a payment in advance the provisions of Part I and the Fourth Schedule shall apply as if the reduced amounts were the whole of the instalment. The consequence of this provision is that if a tenant, for example, pays in advance, he loses, at any rate in part, his right to indemnity by his landlord. This anomaly is now removed, and with it a provision which must have discouraged payment in advance.

As respects payments in advance made on and after June 1, 1942, for the purposes of indemnity the person paying is deemed to have paid the instalment (or the part paid) at the time when it would have been payable.

THE WIDOWHOOD OF THE UNMARRIED WIFE.

By R. E. Megarry.

1. Introduction.

A number of cases have come before the Courts in which a testator has given property by his will to a woman during her "widowhood", and the beneficiary either has been unmarried or has not been married to the husband supposed by the testator. In some of these cases the effect of the gift has not been in issue, either because the true facts were not discovered until after the beneficiary's death (*a*) or because the beneficiary survived the testator for only a very short period (*b*). In others, the question has arisen for decision. In two of these the beneficiary's claim has failed and in four it has succeeded.

2. Cases where the Claim has Failed.

(a) *Re Boddington.*—*Re Boddington* (*c*) was the first of the cases in which the claim failed. A testator left an annuity "to my wife Emily Caroline Boddington . . . so long as she shall continue my widow and unmarried . . . And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my said estate". After the testator had made this will but before he died, his wife obtained a decree absolute of nullity on the grounds of his impotence. Both Fry, J., and the Court of Appeal held that she could not claim the annuity. "It appears to me that the annuity is given to her for a period which can never come into existence. She never was the testator's widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed" (*d*). In the Court of Appeal the Earl of Selborne, L.C., said: "This is certainly not a case in which we are embarrassed by any conflict between what we are compelled to hold and what is reasonable and just; because, if I were asked whether it is at all probable that, in the circumstances of this case, the lady was intended to take the bequest under the will, I should say that it is not at all probable" (*e*). The words used "appear to express, as plainly as language can, that the *status* of widowhood is a condition of the inception and a measure of the duration of the gift . . . She cannot take the annuity at all unless she is the testator's widow" (*f*). He went on to point out that the phrase used was "my widow and unmarried" and dealt with the argument that if "unmarried" had been used alone,

(*a*) *E.g.*, *Re Bolton* (1886), 31 Ch. D. 542.
(*b*) *E.g.*, *N. v. M.* (1885), 1 T. L. R. 523.
(*c*) (1884), 25 Ch. D. 685, affirming (1883), 22 Ch. D. 597.
(*d*) 22 Ch. D. 597, at 602, *per* Fry, J.
(*e*) 25 Ch. D. 685, at 687.
(*f*) *Ibid.*, at 687, 688.

the claim would clearly succeed and that " my widow " expressed the same intention and added nothing to the phrase. " Perhaps that may be so, but one must remember that the moral obligation to make provision for a widow depends upon the fact that she is the testator's widow. Therefore the word ' widow ' must be regarded as the principal word here, and the word ' unmarried ' must be regarded as only added *ex cautelâ*, as I should think, to show that though in some cases and for some purposes rights acquired by a widow as such might continue after her second marriage, it was not intended to be so here " (*g*).

Lord Coleridge, L.C.J., contented himself with merely concurring with Lord Selborne. Cotton, L.J., dealt with the argument on the phrase " my widow and unmarried " by saying: " To say that if she had been in law a widow the reference to the future marriage would alone have been sufficient, and therefore the reference to widowhood may be treated as surplusage, is to alter the will . . . The reference to widowhood is not made merely to point out the person, but it is to point to that which will fix the duration, the beginning, and the ending of this annuity. It fixes the period during which the annuity is to continue, and as the lady was not the testator's widow at the time of his death the annuity could never exist " (*h*).

(b) *Re Kettlewell.*—The other case in which the beneficiary's claim failed is *Re Kettlewell* (*i*). A testatrix gave the income of a share of her residue to her son for life and after his death " to his wife, Alice Emily Kettlewell, during her widowhood ". After the death of the testatrix the wife obtained a decree absolute of divorce against the son, who died shortly afterwards; neither spouse remarried. Parker, J., held that he was bound by *Re Boddington.* " Here the gift is to a named person ' during her widowhood '. No doubt *prima facie* the gift is to that person nominatim, but she cannot take it unless she is the widow of the testatrix's son Arthur. The gift is to commence and finish with widowhood, and, as the lady divorced her husband, she never became a widow, and the period of enjoyment specified has therefore never commenced " (*k*).

3. Cases where the Claim has Succeeded.

Postponing any discussion of the above cases, the decisions in favour of the beneficiary may be examined.

(a) *Dilley* v. *Matthews.*—First, in *Dilley* v. *Matthews* (*l*), which is not very satisfactorily reported (*m*), the testator appointed " my wife Sarah during her widowhood " guardian of his children and gave the income of his trust property " to my said wife for her life, if she shall so long remain my widow unmarried "; after her death " or in case she

(*g*) *Ibid.*, at 688.
(*h*) *Ibid.*, at 691.
(*i*) (1907) 98 L. T. 23.
(*k*) *Ibid.*, at 24; and see *Re Lowe* (1892), 61 L. J. Ch. 415, at 417: " In [*Re Boddington*] the period named by the testator never began or ended."
(*l*) (1863), 11 W. R. 614.
(*m*) The facts as stated in the text have been collected from the report mentioned in the previous note and from 8 L. T. 762 and 2 N. R. 60.

should marry again", the property was to go to other persons. In the lifetime of his lawful wife Elizabeth the testator had gone through a ceremony of marriage with Sarah Nichols with whom he lived and who bore him four children. Wood, V.-C., held that Sarah Nichols was entitled to the income of the property "for her life" (*n*).

(b) *Lepine* v. *Bean*.—The next case was *Lepine* v. *Bean* (*o*), where the testator gave the income of his residuary estate to "my said wife, Margaret Bean, . . . for and during the term of her natural life (provided she shall so long continue my widow and unmarried)". "From and immediately after the decease or second marriage of my said wife, whichever event shall first happen", the testator gave the residue to his children. The testator was in fact married to Elizabeth Bean who survived him, but for the last eight years of his life he had lived with Margaret Bishop, who was known as Margaret Bean and recognised by the testator as his wife. She had borne him four children. The main question in the case was who was entitled under the gift to the children, but in answer to the argument of Mr. Vaughan Hawkins that Margaret Bean could not take because, not having been married to the testator, she could not be his widow, Lord Romilly, M.R., said: "He meant her to take so long as she was unmarried" (*p*), and decreed accordingly.

(c) *Re Wagstaff*.—In *Re Wagstaff* (*q*), however, the question was fully discussed. A testator made certain bequests to his "dear wife Dorothy Josephine Wagstaff" and gave the income of his residuary estate to "my said wife during her life if she shall so long continue my widow, for her own use and benefit; and upon or after her decease or second marriage", he made a gift over to certain of his relatives. The testator and his "wife" had gone through a ceremony of marriage, but she was in fact married to another man who was still alive and the evidence showed that the testator knew this when he made his will. Kekewich, J., said: "Now did [the testator] mean to use the word 'widow' in the strict sense? If that is the proper construction, the case falls under the case of *Re Boddington* and she can take nothing. But I pass that by. Did he mean to use the word in its strict sense? It would have been a cruel mockery, and something worse, for this testator to have sat down and made such a will as this. . . . I think I am not bound to attribute any such intention to the testator. . . . He intended to provide for her, and he cannot have intended in providing for her to take away the income in the very words in which he professed to give it. Therefore I must hold that, when he says 'if she shall so

(*n*) Whether her interest would determine if she married was not stated, and although the reports, taken literally, suggest that it would not, it is more than possible that the Vice-Chancellor intended it to cease on marriage (*i.e.*, on lawful marriage, not the mere celebration of an ineffective ceremony: see *Re Whitfield*, [1911] 1 Ch. 310; and see *Re Eaves*, [1939] Ch. 1000; cf. *Re Butler*, [1918] 1 Ir. R. 394) but that he did not mention the point as the arguments had been directed not to the duration of the interest but to whether Sarah took anything at all. *Lepine* v. *Bean* (*post*, n. (*o*)) and *Re Bleckley* (*post*, p. 88) suggest that this is the correct explanation.

(*o*) (1870) L. R. 10 Eq. 160.

(*p*) *Ibid.*, at 162.

(*q*) [1908] 1 Ch. 162, affirming [1907] 2 Ch. 35.

long continue my widow" he means to use that word in a secondary sense. . . . It has not been suggested that a man may not use 'widow' in a secondary sense. A testator is at liberty to use even technical words in a secondary sense. He knew that she could not be his widow in the ordinary, proper sense of the word; he knew that there could not be a second marriage in the ordinary sense of the word as annexed to widowhood, and I must take him to have intended those words in a secondary sense of some kind or other" (*r*). The learned Judge next considered whether the secondary sense meant until she ceased to be regarded by the world as the testator's widow or until she reunited herself with her husband. He then discussed the words of the gift over—"after her decease or second marriage"—and held that these showed the secondary sense to be attached to "widow". "She is to have his life estate so long as she shall continue his widow, and one thing, and one thing only, is to give it over to others, namely, a second marriage" (*s*). He therefore declared that she was entitled to a life estate until she contracted a marriage subsequent to the death of the testator.

The Court of Appeal unanimously affirmed this decision. "Given his knowledge of the facts, I am bound to say that I think the learned Judge, in the declaration which he made on the construction of this will, was perfectly right, and that this lady is entitled to the income of the estate during her life or until her second marriage. If I wanted any aid to the interpretation in the body of the gift, I should certainly find it in the language of the gift over" (*t*). "Here the testator knew that he had gone through the ceremony of marriage with a lady who had been before married; therefore when he speaks of a second marriage he knows that is not an accurate phrase but he means her future marriage. Then he says she is to have the income so long as she continues his widow, with a gift over on her future marriage. Reading the two together, he means that she shall continue to receive the income until she goes through a further, a future, ceremony of marriage, and in that event the estate shall go over" (*u*). Fletcher Moulton, L.J., pointed out that in *Re Boddington* "the testator contemplated the lady being his widow; here that could not have been so, assuming the testator knew the fact of her husband being alive" (*x*).

(d) *Re Hammond.*—The fourth case is *Re Hammond* (*y*). A testator gave certain property to "my wife Elizabeth" (*z*) absolutely. He then gave to her (i) certain articles "during her widowhood, and after her decease or second marriage", to his daughters; (ii) the right to reside in a house or receive the rent "during her widowhood"; "from and after her decease or second marriage" the house was to

(*r*) [1907] 2 Ch. 35, at 43, 44.
(*s*) *Ibid.*, at 45.
(*t*) [1908] 1 Ch. 162, at 166, *per* Sir H. H. Cozens-Hardy, M.R.
(*u*) *Ibid.*, *per* Farwell, L.J.
(*x*) *Ibid.*, at 164.
(*y*) [1911] 2 Ch. 342.
(*z*) See (1911), 89 L. J. Ch. 690, at 691.

form part of his residuary realty; (iii) a certain income "during the widowhood of my wife". Elizabeth had married before she met the testator, but her husband had disappeared, and over eight years later she went through a form of marriage with the testator. Both believed the husband to be dead, but both realised that if in fact he were alive their marriage was invalid. More than four years after the testator's death the husband was found to be alive. Parker, J., said: "Am I to construe the expression 'during her widowhood' as importing a condition or as simply describing the time during which she is to enjoy the gifts? It appears from authorities which have been quoted that reference to widowhood may import a condition, and here, if it does so, the condition is of this nature: the testator says 'I am fully aware of the nature of my relationship with the lady who is living as my wife, and that if [her husband] is alive she is not my wife; I am only providing for her if she is my wife, and if she is not my wife I give her nothing'. I think it is clear that a provision of that sort would not only be capricious but exceedingly unjust to the lady, and, unless I am forced by the actual words of the will to do so, I ought to lean in the other direction and not to import such a condition. On the other hand, if I can construe this expression as meaning merely the period during which she is to enjoy what he has given her, no difficulty arises" (*a*). He proceeded to hold that he could construe it in the latter sense "having regard to the circumstances" and to the terms of the gift over. "So read, the will is perfectly sensible and one which one would imagine the testator would make in the circumstances, whereas if it imports a condition it would be capricious and unjust" (*b*). He then referred to *Re Boddington* and pointed out that Lord Selborne had referred to the wife having obtained a nullity decree as showing that "any moral obligation on the testator to provide for her was thereby absolutely removed. Here, on the contrary, if I am to consider moral obligations, the moral obligation on the testator to provide for the lady would be strengthened if the marriage turned out to be invalid". He then went on to say that "in each of the other cases undoubtedly the testator knew that his marriage was not a valid marriage" but that here the parties believed they were married although they knew that there was a risk that they were not (*c*). He concluded by holding that "the expression 'during her widowhood' was not intended to import a condition but to define the period during which she was to enjoy the gifts. In these circumstances the lady is entitled to the benefits given to her by the will until her death or future marriage" (*d*).

(*a*) [1911] 2 Ch. 342, at 346.

(*b*) *Ibid.*

(*c*) *Ibid.*, at 347. He added (p. 347) that "this is the only case in which the question has arisen where the testator thought he was safe". What the Judge meant by this last comment is not clear; he cannot be referring to the state of the testator's mind when he made his will, for just before, in speaking of *Re Boddington*, he said: "There in the full belief that the lady was his wife the testator . . ." (p. 346). Probably he was referring to the state of the testator's mind when he died, for *Re Kettlewell*, in which the true facts did not appear until after the death of the testatrix, does not seem to have been cited.

(*d*) *Ibid.*, at 347.

4. PRINCIPLES.

The next question is what principles, if any, can be deduced from these cases. One text-book puts matters thus: "If the gift is to the wife, who is accurately so described, expressly 'during widowhood', the latter words form a condition as to the beginning and ending of her interest, so that the effect of a subsequent divorce before the gift takes effect is that she is disentitled to the gift, since she does not then become a widow (*Re Boddington*: *Re Kettlewell*); if she is not accurately so described, the words may be read 'until death or remarriage' (*Re Wagstaff*: *Re Hammond*)" (*e*).

This may be amplified as follows:—

(1) In all the reported cases, the will has referred to the beneficiary expressly as being a wife, *e.g.*, "to my wife Jane".

(2) The word "widowhood" must be construed in the light of the meaning given to the word "wife" which precedes it.

(3) If, as in *Re Boddington* and *Re Kettlewell*, at the date when the will is made the word "wife" is accurately used in its strict sense as descriptive of a lawful spouse, the word "widowhood" will also be construed in its strict sense; "only a woman who had been a wife could become a widow" (*f*).

(4) If, on the other hand, as in *Dilley* v. *Matthews*, *Lepine* v. *Bean*, *Re Wagstaff* and *Re Hammond*, at the date when the will is made the word "wife" is loosely used in a secondary sense as descriptive of a partner in an unhallowed union, the word "widowhood" will also be construed in a secondary sense and the testator will be taken to have intended it to apply to the period during which the beneficiary would have been his widow if she had been his wife (*g*). The word "wife" is the dictionary which shows how "widow" is to be construed.

An alternative but closely connected way of stating the position is to relate the result to the circumstances rather than to the way in which the word "wife" is used; in addition to what may be called the "verbal construction" there is also a "circumstantial construction". In those cases where the claim has succeeded the beneficiary has been no more and no less married to the testator when the gift took effect than when the will was made; at his death she was as much a widow to him as she would have been if he had died the moment after the will was made. In each of the cases where the claim has failed, however, an event of vital importance occurred between the making of the will and the testator's death, in one case a nullity decree and in the other a divorce; when the testator died the beneficiary was much less a widow and much less the probable object of his bounty than she would have been if her husband had died immediately after the will was made.

(*e*) Halsbury's Laws of England (2nd ed.), Vol. 34, p. 327, by J. M. Lightwood.
(*f*) See *Phillips* v. *Probyn*, [1899] 1 Ch. 811, at 817, *per* North, J.
(*g*) See *Re Lowe* (1892), 61 L. J. Ch. 415, at 417.

5. Re Gale.

(a) *General Statement.*—In this state of the authorities *Re Gale* (*h*) fell for decision. A testator made certain provisions in his will for his lawful wife and then gave to Dorothy Marie Laing the use and enjoyment of the house in which she was living "during her widowhood" and a weekly sum "during her widowhood" for a period of twelve years. Dorothy Marie Laing was, as the testator well knew, a spinster; he had lived with her for many years and had had four children by her. Farwell, J., examined the facts and judgments in *Re Wagstaff* and *Re Boddington* and stated that if one took *Re Boddington* the gift failed, whereas on the other hand it had been argued that the gift was to begin at the death of the testator and was "to continue until the marriage of the donee, and that the condition upon which the benefits cease are in general restraint of marriage and consequently void with the result that the donee is entitled to the enjoyment of the house, not 'during her widowhood', but on the footing that the house belongs to her. With regard to the payment of £1 5s. a week, it is likewise argued that she is entitled to it for twelve years. In my judgment, in this case I ought to follow the decision in *In re Boddington*. It seems to me that the principle of that decision applies in this case. Here there is a gift to a person for a period which, in fact, can never exist at all. The period begins with something which can never happen, namely, the moment at which Dorothy Marie Laing becomes the widow of the testator. There never can be any period during which she is or was his widow, and all that she is given is an interest during her widowhood" (*i*). The learned Judge consequently held that the claim failed. "The testator intended to benefit the lady by his will, but he has used language which, in my judgment, unfortunately, cannot have that effect" (*k*).

None of the reports gives any indication that *Re Kettlewell*, *Dilley* v. *Matthews*, *Lepine* v. *Bean* or *Re Hammond* were considered.

(b) *Discussion.*—This decision raises a number of interesting points. One is the argument, which may possibly have affected the attitude of the learned Judge, that if "during her widowhood" were to be construed as determining the beneficiary's interest on marriage, it would be void as being in general restraint of marriage. The decision of Farwell, J., that the phrase did not bear that meaning made it unnecessary to decide whether this argument was sound. The rule avoiding conditions in general restraint of marriage does not, of course, apply to restraints on second marriage (*l*) and in most of the earlier

(*h*) [1941] Ch. 209; 110 L. J. Ch. 69; 1 All E. R. 329; 57 T. L. R. 320; 165 L. T. 224.

(*i*) [1941] Ch. 209, at 217, 218.

(*k*) *Ibid.*, at 218.

(*l*) *Barton* v. *Stone* (1693), 2 Vern. 308; *Scott* v. *Tyler* (1788), 2 Bro. C. C. 431, at 488; *Lloyd* v. *Lloyd* (1852), 2 Sim. (N.S.) 255; *Newton* v. *Marsden* (1862), 2 J. & H. 356; *Allen* v. *Jackson* (1875), 1 Ch. D. 399. On the principle stated in *Adams* v. *Adams*, [1892] 1 Ch. 369 at 376, some of these cases might perhaps have been decided on the ground that there was a determinable limitation rather than a condition subsequent: see, *e.g.*, *Allen* v. *Jackson* at pp. 404, 408; cf. *Bellairs* v. *Bellairs* (1874), L. R. 18 Eq. 510.

decisions relevant to *Re Gale* the beneficiary was in fact married at the date of the will, either to the testator or someone else, so that the point could not arise. In *Re Boddington* the marriage was subsequently declared a nullity but the gift was held to be ineffective and no question of the validity of the restraint arose. In *Dilley* v. *Matthews* and *Lepine* v. *Bean*, however, the beneficiary seems to have been a spinster, yet in neither case does it appear to have been argued that there was a general restraint on marriage. It is difficult to see how such an argument could succeed, for (a) a clause intended not wantonly to restrain marriage but to make provision for the beneficiary until marriage is valid (*m*); and (b) a gift "during widowhood" clearly seems to be a limitation creating a determinable interest rather than a gift subject to a condition subsequent, and takes effect as a limitation "until marriage" (*n*), which is free from the rule relating to void conditions in restraint of marriage and is valid even if the beneficiary is a spinster (*o*).

Another point is that *Re Gale* is the first reported case in which the beneficiary has not been referred to in the will expressly as a wife; the gift was not "to my wife Dorothy Mary Laing" but "to Dorothy Mary Laing" *simpliciter*. The "verbal construction" referred to above (*p*) is thus at once ruled out (*q*). Had Farwell, J., wished to distinguish *Re Gale* from the earlier cases and decide it upon some principle not to be found in them, he might have made use of this distinction. He does not appear to have done this, however; by stating that the principle of *Re Boddington* applied to *Re Gale* (*r*) he seems to have recognised that despite the differences between *Re Gale* and the earlier cases, *Re Gale* was to be decided upon the principles established by them.

The third point is that it is hard to find any arguments in support of the decision in *Re Gale* and easy to find arguments against it.

First, as to the absence of arguments in support of it. An analysis of the judgment may be made on the following lines:—

(1) Statement of the facts in the case (pp. 210–12).
(2) Statement of the facts and decisions in *Re Wagstaff* and *Re Boddington* (pp. 212–16).
(3) Explanation that neither case is on all fours with *Re Gale* (pp. 216–17).
(4) Explanation that if *Re Boddington* is applied D. M. L.'s claim fails and if not it is successful (p. 217).
(5) Statement that *Re Boddington* applies and ought to be followed (pp. 217–18).
(6) Judgment accordingly (p. 218).

(*m*) *Jones* v. *Jones* (1876), 1 Q. B. D. 279; *Re Hewett*, [1918] 1 Ch. 458.

(*n*) See Jarman, Wills (7th ed., 1930), 1514; *Dilley* v. *Matthews* (*supra*); *Re Hammond* (*supra*).

(*o*) *Morley* v. *Rennoldson* (1843), 2 Hare 570, at 579–81; *Webb* v. *Grace* (1848), 2 Ph. 701; *Heath* v. *Lewis* (1853), 3 De G. M. & G. 954; *Potter* v. *Richards* (1855), 24 L. J. Ch. 488; *Re King's Trusts* (1892), 29 L. R. Ir. 401; *Re Mason*, [1910] 1 Ch. 695; *Re Elliott*, [1918] 1 Ir. R. 41; *Re Hewett*, [1918] 1 Ch. 458.

(*p*) *Supra*, p. 80.

(*q*) Unless perhaps it could be said that the reference to future widowhood implied a reference to the donee as "wife" at the date of the will.

(*r*) *Supra*, p. 82.

It will be seen that from (1) to (4) and from (5) to (6) the judgment proceeds upon normal lines. The crucial point, however, is the nexus between (4) and (5), and this is hard to discover. The learned Judge clearly seems to have felt that there was some principle in *Re Boddington* which applied to *Re Gale* but he nowhere makes that principle explicit. There is just the bare statement: " In my judgment, in this case I ought to follow the decision in *Re Boddington*. It seems to me that the principle of that decision applies in this case " (*s*). He then goes on to point out that there is a gift for a period which can never exist, for it begins with something which can never happen, namely, the moment when D. M. L. becomes the testator's widow (*t*). This, however, is in no sense a reason in support of the learned Judge's decision but merely a statement of the consequences of it. Before it can be said whether or not the gift is for a non-existent period it must be decided whether " widowhood " is to be given a strict or secondary meaning. If it is to be construed strictly there is indeed no period of widowhood, but if it is construed in a secondary sense a period of " widowhood " does exist. To say " There is a gift for a non-existent period " necessarily implies " I have already decided that ' widowhood ' is to be construed strictly ". The decision in favour of a strict construction thus rests solely on the bare statement that the principle of *Re Boddington* applied to *Re Gale*. This provokes the question " Why ? ", but no answer is given. In short, the judgment contains an assertion but no reason; of the two alternatives before the Court one is chosen without explaining why. The only apparent reason which supports the decision lies in the argument that *prima facie* the word " widowhood " will be construed strictly unless a contrary intention is shown. If this had been the basis of the decision it would have been easy to say so, and some part of the judgment would no doubt have been devoted to a refutation of the arguments that a contrary intention had been shown; but none of this appears in the judgment.

Secondly, the arguments against the decision may be considered.

(i) According to the " circumstantial construction " referred to above (*tt*) the claim should have succeeded, for no vital change of circumstances took place between the execution of the will and the death of the testator; D. M. L. was no more and no less a widow when the testator died than she would have been if he had died immediately after making his will. To say that *Re Gale* resembles *Re Wagstaff* rather than *Re Boddington* for this simple and intelligible reason is more convincing than the bare assertion that the reverse is the case.

(ii) The choice lies between " during her widowhood " having (a) a strict meaning, (b) a secondary meaning or (c) no meaning at all. In considering this some general principles of construction may usefully be examined. The maxim *ut res magis valeat quam pereat* is perhaps pre-eminent. The duty of the Court in construing wills is *ex fumo dare*

(*s*) p. 217.
(*t*) pp. 217, 218.
(*tt*) *Supra*, p. 80.

lucem (*u*). Although when considering a will the Court must regard " non quod voluit sed quod dixit, or rather, we are to ascertain quod voluit by interpreting quod dixit " (*x*), it is for the Court " to make such a construction, so that all the words of the will may stand, for to add anything to the words of the will, or in the construction made, to relinquish and leave out any of the words, this is maledicta glossa . . . every string ought to give his sound " (*y*). The well-known general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As is said in *Wigram on Extrinsic Evidence* (5th ed., 1914), p. 9: " The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." " But we think that the meaning of words varies according to the circumstances of and concerning which they are used " (*z*). " The same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family " (*a*). " The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intentions from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances " (*b*).

In the light of these principles the Court had to choose between the three possible interpretations set out above. The last may be readily dismissed; although it has been said that " every testator . . . is at liberty to adopt his own nonsense " (*c*), the Court will rarely allow itself to be forced into the position of saying that a phrase has no meaning at all. As Farwell, J., himself said in a subsequent case: " Counsel has submitted that the gift is void for uncertainty. I do not think that is the way in which I should construe it, unless I am satisfied that it was incapable of having any certain meaning. The expression ' and/or ' is unfortunate; I do not think I have met it before in a will and I hope I shall never meet it again. I have, however, to put a meaning on it if possible " (*d*). Again, Kekewich, J., in *Re Wagstaff* (*e*), in adopting a secondary meaning for " widow ", said: " It seems to me that there

(*u*) *De Beauvoir* v. *De Beauvoir* (1846), 15 L. J. Ch. 305, at 308.
(*x*) *Grover* v. *Burningham* (1850), 5 Exch. 184, at 194.
(*y*) *Blamford* v. *Blamford* (1615), 3 Bulstr. 98, at 103.
(*z*) *Allgood* v. *Blake* (1873), L. R. 7 Ex. 160, at 162.
(*a*) *The River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at 764.
(*b*) *Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, at 367, 368.
(*c*) *Vaughan* v. *Marquis of Headfort* (1840), 10 Sim. 639, at 641.
(*d*) *Re Lewis* (1942), 111 L. J. Ch. 256.
(*e*) [1907] 2 Ch. 35, at 45.

I have the key and that I am on safe ground if I take that key and apply it to unlock what otherwise is, no doubt, a very tightly fastened door. I must find some way out of it. I am not at liberty to say that the testator meant nothing." The question, then, may perhaps be narrowed down to a choice between a strict meaning and a secondary meaning being given to the phrase.

The effect of giving the phrase a strict meaning is to impute to the testator an intention to make a provision which is little short of fantastic. Seated in the testator's armchair (*f*) the Court finds that he intended D. M. L. to have nothing unless she lawfully marries him or someone else and then survives her spouse. If a marriage to someone else is intended, the testator must be taken to say: "Unless you have married someone else in my lifetime and he has died, when I die you must leave this house in which you now live and you will receive no income from me, but if you later manage to find a husband and outlive him, then, until you marry again, you may occupy this house and receive an income." There is no need to stress the absurdity of such an interpretation; in the earlier cases where the phrase "during her widowhood" (*g*) rather than "while she shall continue *my* widow" (*h*) has been used, such an interpretation does not even seem to have been considered, and in *Re Gale* the learned Judge appears to have ruled it out, for he seems to equate "during her widowhood" with "while she shall continue my widow" (*i*). If the phrase is to be given a strict meaning, the testator must therefore be taken to be referring to the period when D. M. L. is *his* widow. On this footing, he must be taken to say: "I intend you to have the property only if my existing marriage is terminated and I subsequently marry and predecease you. Even then you will not get it unless the will was made after 1925 and expressed to be in contemplation of my marriage with you (*j*), for otherwise our marriage will revoke the will (*k*) and so destroy both the gifts to you and the gifts to my wife, which latter, since I have married you, may have lapsed already by her death." No doubt, practitioners receive strange instructions from testators from time to time, but few can be as strange as the intent imputed to the testator in *Re Gale*. The learned Judge twice pointed out that the testator intended to benefit D. M. L. "The testator intended to benefit the lady by his will, but he has used language which, in my judgment, unfortunately, cannot have that effect" (*l*). "That he did intend her to have some provision under the will is, I think, plain: but has he made that provision in terms entitling her to enjoy it?" (*m*). The answer to this seems clear enough: "Yes, if you read 'widowhood' in a secondary sense."

To give a secondary meaning to "widowhood" seems to accord both

(*f*) *Boyes* v. *Cook* (1880), 14 Ch. D. 53, at 56.
(*g*) *Re Kettlewell* and *Re Hammond* (*supra*).
(*h*) *Dilley* v. *Matthews*, *Lepine* v. *Bean*, *Re Boddington* and *Re Wagstaff* (*supra*).
(*i*) "There never can be any period during which she is or was his widow" ([1941] Ch. 209, at 218).
(*j*) Law of Property Act, 1925, s. 177.
(*k*) Wills Act, 1837, s. 24.
(*l*) [1941] Ch. 209, at 218.
(*m*) *Ibid.*, at 217.

with authority and common sense. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable" (*n*). In *Re Boddington* it was "not at all probable" that the lady was intended to take the bequest (*o*), whereas in *Re Wagstaff* (and, it may be said, equally in *Re Gale*) "it would have been a cruel mockery, and something worse, for this testator to have sat down and made such a will as this . . . he cannot have intended in providing for her to take away the income in the very words in which he professed to give it" (*p*). As Sir John Strange, M.R., once said: "Men should not sin in their graves" (*q*).

(c) *Conclusion.—Re Gale* can therefore scarcely be regarded as a satisfactory decision. The authorities relevant to it, when duly examined, appear to support the validity of the gift or at the worst to be indifferent. It is true that considerable caution must be used in applying a decision on one will to another; "every will stands on its own bottom and is as various as any thing whatsoever, and therefore it is hard to cite a case that can quadrate" (*r*). Nevertheless, Farwell, J., treated the case as one to be governed by the authorities and it therefore seems justifiable to suggest that the decision should have been different because the wrong authority was followed. Some, indeed, might even regard the decision as illustrating the Chancery Division in one of the roles attributed to it by the cynical—the frustration of testators' wishes by the misinterpretation of authorities of doubtful relevance (*s*). Others may recollect the words of Coke, C.J., who once spoke of "*Maledicta expositio quæ corrodit viscera voluntatis*" (*t*). The decision is there, however, and it is the decision rather than any criticism of it, however sound, to which the greater weight is likely to be given in future cases (*u*). The modern system of law reporting has its advantages but there are times when a gentle tear may be shed for the days when there was a drawer for Lord Ellenborough's bad law. *Re Gale* has been reported, however, and as long as it remains unquestioned by other Courts, practitioners must treat it with respect.

(*n*) Wigram, Extrinsic Evidence (5th ed., 1914), Proposition III, p. 47.
(*o*) *Ante*, p. 75.
(*p*) *Ante*, p. 77.
(*q*) *Thomas* v. *Britnell* (1751), 2 Ves. sen. 313, at 314.
(*r*) *Per* Treby, C.J., *Monnington* v. *Davis* (1695), Fort. 224, at 227; see also *Re Ingle's Trusts* (1871), L. R. 11 Eq. 578, at 586, 587; *Re Macduff*, [1896] 2 Ch. 451, at 469.
(*s*) It was Eve, J., who was reputed to have said: "I shudder to think that in the hereafter I shall have to meet those testators whose wishes on earth have been frustrated by my judgments" (60 L. N. 26).
(*t*) *Blamford* v. *Blamford* (1615), 3 Bulstr. 98, at 108.
(*u*) See, *e.g.*, 27 L. Q. R. 482.

6. Drafting.

At first sight it might be thought that the decision necessitates some changes in draftsmanship. A closer examination, however, suggests that this is not the case. The possible circumstances are:—

(1) *Gift to a mistress where there is no desire, or it is impossible, to conceal her status by describing her as the testator's wife*, as in *Re Gale*. Here few practitioners would do what was done in *Re Gale* and use the word "widowhood". "To Jane for her life until she shall marry", followed by "and after her death or marriage aforesaid to . . .", if there is to be a gift over, seems clear and unambiguous and some such wording as this should be used (*w*).

(2) *Gift to a mistress whose status is to be concealed or to a supposed wife whose married status is in any doubt.* In this case *Re Wagstaff* and its satellites may be relied upon and the gift made "to my wife Jane during her widowhood", followed by "and after her death or second marriage to . . ." if there is to be a gift over (*x*). There seems to be nothing in *Re Gale* to throw any doubt on the effectiveness of such a limitation; the testator's implicit definition of the meaning to be given to "wife" will show what meaning is to be given to "widowhood" and "second marriage", and *Re Gale*, where "wife" was not used, is clearly distinguishable (*y*).

(3) *Gift to a wife about whose status there is no doubt.* Here the phrase used in the preceding category is clearly accurate and appropriate.

While it is therefore thought that draftsmen need make no change in their settled practice, some may feel that *Re Gale* indicates the direction in which the current of judicial opinion is flowing and that the Courts are likely to "distinguish" cases such as *Re Wagstaff* whenever possible. Others may feel that in making a gift to a mistress it is poor draftsmanship to use words such as "wife", "widowhood" and "second marriage" in a sense which is known to be strictly untrue. For any with these views a suggested alternative expression is discussed in an appendix to this article; for others it will probably suffice to note that *Re Gale* is open to serious criticism but that it does not appear to affect the normal course of draftsmanship (*z*).

(*w*) See 2 K. & E. (14th ed., 1940), p. 1016; see also 18 Encyc. (2nd ed., 1925), 584, 585.

(*x*) This is substantially the wording in *Re Hammond* (*supra*), which is rather more concise than that employed in *Re Wagstaff* (*supra*).

(*y*) *Ante*, pp. 80, 82.

(*z*) I am indebted to Professor Harold Potter and Mr. V. P. Harries for reading the manuscript and making helpful suggestions.

APPENDIX.

In cases falling within the first and third categories above, no difficulty arises. In cases which fall into the second category, namely, those where the donee is a mistress whose status is to be concealed or a supposed wife whose status is in any doubt, the problem is to find some expression which will operate equally well whether or not the donee is married, without suggesting any uncertainty about her status. The following points occur in attempting to build up such an expression to replace the traditional "during her widowhood" (*a*).

(1) On the principle of *falsa demonstratio non nocet*, a gift "to my wife Jane" will, in the absence of fraud on her part (*b*), be valid even if Jane is not married to the testator (*c*). Despite the possible danger that the gift might be attacked on the ground that in order to obtain the gift Jane fraudulently concealed from the testator that she was not his wife (*d*), it seems desirable to describe the donee as the testator's wife. The omission of such a description would seem strange if there is a valid marriage and if there is not the omission might serve to confirm the suspicions of the testator's relatives and friends; the risk of any allegation of fraud will probably be very remote. The use of the words "my wife" might possibly assist the wishes of a testator who is lawfully married to Jane but whose marriage is dissolved (*e*) or declared void (*f*) between the making of the will and his death.

(2) The words "my wife Jane" should be followed by "during her life until she shall marry" (*g*). For the reasons considered above (*h*) it seems to be clear that these words will create a determinable limitation which will bring Jane's interest to an end on her remarriage, if she was married, or on her first marriage if she was not.

(3) The word "again" may perhaps safely be added after "marry", for even if Jane is a spinster there is authority for saying that the word "again" will not prevent her interest from determining on what will in fact be her first marriage. In *Re Bleckley* (*i*) a testator who had gone through an invalid ceremony of marriage with the donee, left property "to my wife Ada Morton Bleckley . . . but only till she shall marry again . . . and after the death or remarriage of my said wife" to various other beneficiaries. Eve, J., held that the donee was entitled to a life interest until marriage and although an appeal on another point succeeded, no appeal was made on this point (*k*). It appears therefore that "again" may serve as a cloak for an unhallowed union without affecting the validity of the gift (*l*).

(*a*) See, *e.g.*, 2 K. & E. (14th ed., 1940), pp. 820, 821, 882, 883; 3 Prideaux (23rd ed., 1937), pp. 706, 737; 18 Encyc. (2nd ed., 1925), p. 510; Kelly (8th ed., 1933), pp. 729, 734.

(*b*) If a testator gives a legacy to a woman under the particular character, falsely assumed by her and deceiving him, of his wife, and this alone is the motive of his bounty, the Court will set aside the legacy (*Wilkinson* v. *Joughin* (1866), L. R. 2 Eq. 319; and see *Meluish* v. *Milton* (1876), 3 Ch. D. 27).

(*c*) *Giles* v. *Giles* (1836), 1 Keen 685; *Doe* d. *Gains* v. *Rouse* (1848), 5 C. B. 422; *Dilley* v. *Matthews* (*supra*); *Meluish* v. *Milton* (*supra*); *Re Boddington* (*supra*); *Anderson* v. *Berkley*, [1902] 1 Ch. 936; *Re Wagstaff* (*supra*); *Re Smalley*, [1929] 2 Ch. 112. This seems to be so even if the parties have gone through no ceremony of marriage; see *Lepine* v. *Bean* (*supra*) and perhaps *Re Bleckley* (1919), 121 L. T. 571 (see p. 572).

(*d*) See Halsbury, Laws of England (2nd ed., 1940), Vol. 34, p. 45.

(*e*) *Re Kettlewell* (*supra*).

(*f*) *Re Boddington* (*supra*).

(*g*) See, *e.g.*, 2 K. & E. 1016; see also 18 Encyc. 584, 585.

(*h*) *Ante*, p. 82.

(*i*) (1919), 121 L. T. 571.

(*k*) [1920] 1 Ch. 450, at 460.

(*l*) Consider also *Lepine* v. *Bean*, *Re Wagstaff* and *Re Hammond* (*supra*) when "second marriage" was the phrase employed.

(4) Some consideration must be given to the position if Jane is not married to the testator but after the date of the will and before his death marries either him or someone else. If she marries the testator (*m*) the will is revoked by the marriage (*n*) unless it was expressed to be made in contemplation thereof (*o*). It appears from the criticised (*p*) decision in *Pilot* v. *Gainfort* (*q*) that if the will refers to "my wife Jane" and the testator marries her a reasonable time afterwards, *e.g.*, eighteen months, the words "my wife" may amount to a sufficiently expressed contemplation of the marriage to save the will. If the will stands, either because it falls within this exception or because Jane marries someone other than the testator, the question is whether the marriage in the testator's lifetime destroys the gift. It is clear that in such a case it cannot be said that because of the rule that a will speaks from death (*r*) only a marriage after the testator's death is intended (*s*). The question is one of construction, but *prima facie* a reference in a will to future marriage includes marriage in the testator's lifetime as well as marriage after his death (*t*). It would thus seem that if there is a gift to Jane for life "until she shall marry", her marriage in the testator's lifetime will *prima facie* destroy the gift to her (*u*) notwithstanding the testator's knowledge and approval of the marriage (*x*) unless the context shows that only a marriage after the testator's death was intended. If, however, Jane marries the testator and his will nevertheless remains valid "it would be an extraordinary construction that, because [the testator] married her, therefore she should lose the estate" (*y*), and the gift may perhaps remain good. Probably there is no need to insert words specially to deal with such a situation, for the chances of such events occurring are small and even if they did occur without the testator altering his will, the results suggested by the existing law are satisfactory. If it is desired to put the point beyond doubt, the words "after my death" or "after the date of this my will", as the case requires, may be added.

(5) Any gift over in the event of marriage should be worded "and after her death or marriage as aforesaid, to . . ." The word "remarriage" might be harmless, but it seems safer to avoid it.

The full phrase thus evolved is set out below. The hyper-cautious should omit the italicised words but include those in square brackets, but for general use the inclusion of the italicised words and the omission of those in square brackets may be recommended as being effective yet tactful.

"To *my wife* Jane during her life until she shall marry *again* ["after my death" or "after the date of this my will"] and after her death or marriage as aforesaid, to . . ." No phrase can obtain final acceptance until it has been tested in the Courts, and no doubt variations or improvements may be suggested. Nevertheless it can be said that, with the qualification set out below, a phrase

(*m*) As in *Cooper* v. *Cooper* (1856), 6 Ir. Ch. R. 217.
(*n*) Wills Act, 1837, s. 18.
(*o*) Law of Property Act, 1925, s. 177.
(*p*) See, *e.g.*, Theobald, Wills (9th ed., 1939), 36.
(*q*) [1931] P. 103.
(*r*) Wills Act, 1837, s. 24.
(*s*) *Bullock* v. *Bennett* (1855), 7 De G. M. & G. 283; *Re King's Trusts* (1892), 29 L. R. Ir. 401; *Re Greene*, [1895] 1 Ir. R. 130, at 132. The section merely provides that the will is to be thus construed "with reference to the real estate and personal estate comprised in it".
(*t*) *Re Chapman*, [1904] 1 Ch. 431, affd. *sub nom. Chapman* v. *Perkins*, [1905] A. C. 106.
(*u*) See, *e.g.*, *Andrew* v. *Andrew* (1845), 1 Coll. C. C. 686; *Re King's Trusts* (1892), 29 L. R. Ir. 401; and see *Re Greene*, [1895] 1 Ir. R. 130 (doubted, Jarman, Wills (7th ed., 1930) 1499).
(*x*) *Bullock* v. *Bennett* (1855), 7 De G. M. & G. 283.
(*y*) *Cooper* v. *Cooper* (1856), 6 Ir. Ch. R. 217, at 223, *per* Brady, L.C.

constructed on the lines suggested above is an improvement on the traditional "during her widowhood".

The one disadvantage of this new phrase is this. In most cases the testator will wish the donee to take nothing if she is in fact married to him but, by a decree of divorce or nullity, ceases to be his wife between the making of the will and his death. A gift "during widowhood" will achieve this result (*z*), whereas a gift in the form suggested above probably would not (*a*). It is obvious that most testators whose marriages have been terminated in the Divorce Court should make a new will, but equally obviously some testators will fail to do this. In such cases the choice lies between (a) using the new phrase and risking the statistically small chance of the marriage being found to be valid and being followed by a decree of divorce or nullity, and (b) using "during widowhood" and risking the unpredictable chance of the donee being found to be unmarried and the Court holding the phrase "during widowhood" to be ineffective. If, however, the donee is known to be a mere mistress, or is intended to take even if her marriage is dissolved (*b*), the new phrase may safely be used.

THE COURTS (EMERGENCY POWERS) AMENDMENT ACT, 1942.

By E. O. WALFORD, LL.D., Solicitor.

Two important changes are made by this amending Act, and the general nature of those changes are as follows. Hitherto, with certain exceptions, it has been the policy of the Legislature to allow parties to institute proceedings and to obtain judgment, regardless of the question whether they will be allowed to enforce the judgment, or whether such conditions will be imposed that the judgment is, for the time being, of little value.

(1) *Leave before action.*

The Courts (Emergency Powers) Act, 1942, works on quite a different principle, namely that before any substantial expense is incurred the Court is to be enabled to consider the situation and to refuse to permit the commencement of proceedings if it thinks fit.

(2) *Relief to persons not "liable to pay".*

The second change which is made arises from what was no doubt an error of drafting, but which has had curious results. The relief contemplated by the Courts (Emergency Powers) Act, 1939, was to be granted to "the person liable to satisfy the judgment or order, or to pay the

(*z*) *Re Boddington* and *Re Kettlewell* (*supra*).

(*a*) Unless substantial weight is attached to "my wife": see *ante*, p. 88.

(*b*) The phrase set out above might, for example, be used (with minor modifications) where the gift is to the wife of someone other than the testator, such as a daughter-in-law (as in *Re Kettlewell* (*supra*)), and the testator's bounty springs from his appreciation of the donee personally rather than a mere recognition of her status.

rent or other debt or to perform the obligation in question ". It is obvious that in the case of a mortgage, if the mortgagee is allowed to enforce his security (*e.g.*, by sale) there may be persons who are not liable, in an action by the mortgagee, to satisfy the debt but who (*e.g.*, as assignees of the equity, or second mortgagees) may be materially affected by the putting into force of the mortgagee's right of sale. The 1942 Act does not make a clean sweep of the former provision. In this respect the change is confined to default in respect of liability under a mortgage. The scheme is that, in such cases, where the mortgagee seeks leave to enforce any right or remedy under his mortgage the Court may consider what persons will be affected by the exercise by the mortgagee of the right or remedy which he seeks to enforce, and may treat any such persons as if they were liable to pay the mortgage money or perform the mortgage obligation (*e.g.*, to pay insurance premiums, or interest under the mortgage), and may grant relief accordingly. This sounds as if persons who are not in fact directly liable to meet obligations will be rendered liable to meet them; but as they are only to be treated as liable for the purposes of the Courts (Emergency Powers) Acts, 1939 to 1941, no question of this kind arises.

(3) *A fictitious Act.*

Before passing to a more detailed consideration of the 1942 Act we had better explain one point which might otherwise give considerable trouble to anyone who thinks that he must have overlooked the Courts (Emergency Powers) Act, 1941. Readers of Dickens' works will, no doubt, recall that there was a character in one of his novels who observed of another character, " I don't believe there's no sich a person ". Substitute " statute " for " person " and one has the answer. Although the 1942 Act is to be construed as one with the C. (E. P.) Acts, 1939 to 1941, there is no such Act of 1941. It is just one of those little jests of the Legislature, or the draftsman, or of some other mysterious body or person. When the Liabilities (War-Time Adjustment) Act, 1941, was passed it contained two sections of a special nature which should not have been buried in that Act. The first, section 26, extended the operation of the C. (E. P.) Acts, 1939 and 1940, to contracts made after the beginning of the war, and it was declared by sub-section (4) of section 26 that that section and the C. (E. P.) Acts, 1939 and 1940, might be cited together as the C. (E. P.) Acts, 1939 to 1941. In other words, section 26 of the Liabilities (War-Time Adjustment) Act, 1941, is, in effect, the Courts (Emergency Powers) Amendment Act, 1941. The second section, section 27 of the Liabilities (War-Time Adjustment) Act, 1941, extended the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, to mortgages made after the beginning of the war; but that section is not christened the P. M. L. (E. P.) Amendment Act.

Having explained briefly the scheme of the 1942 Act, we may now consider in detail its provisions, the circumstances which led to its passing and the results which will flow from the Act and the rules made thereunder, so far as they can be foreseen.

Relief to Parties not Liable to Pay.

By section 1 (1) of the 1942 Act where a mortgagee applies under the C. (E. P.) Acts for leave to exercise *against the property* any right or remedy arising by virtue of a default in the payment of the mortgage money or a breach of any mortgage obligation, the Court may, for the purposes of those Acts, treat any person appearing to the Court to be affected by the exercise of the right or remedy as if he were the person liable to pay the mortgage money or to perform the mortgage obligation, or, as the context may require, as if he were the mortgagor, and may grant relief accordingly.

As we have already explained, relief under the 1939 Act could be granted only to the person directly liable to satisfy the judgment or order or to pay the mortgage debt or to perform the mortgage obligation. Thus, A charges (say) his freehold or leasehold property or his shares to C to secure B's debt to C but does not agree to pay B's debt. If C sought to take possession of A's property pursuant to the charge and to sell it the 1939 Act afforded no relief to A, for he was not liable to pay B's debt or perform his obligation: *Re National Provincial Bank*, [1941] Ch. 158; [1941] 1 All E. R. 97; and see *Re Midland Bank*, [1941] Ch. 350; [1941] 2 All E. R. 135. But it was held in the last-mentioned case that the mortgagee must nevertheless obtain leave; for by section 1 (2) (a) of the 1939 Act no person may (*inter alia*) exercise any remedy by way of taking possession of property, or by appointing a receiver, or by re-entry upon land, or the realisation of any security without the leave of the Court. Again, where a mortgagee applies for leave to exercise his remedy by way of appointing a receiver, and the person interested in the equity of redemption is the mortgagor's trustee in bankruptcy *or an assignee of the mortgagor*, it was held by Uthwatt, J., in *Re Midland Bank*, [1941] 3 All E. R. 299, following the two earlier bank cases above mentioned, and *Hinckley, etc., Building Society* v. *Freeman*, [1941] Ch. 32, that no relief could be granted under the 1939 Act. Although no relief could be granted under that Act, Morton, J., held in *Re Hearts of Oak, etc., Building Society*, [1942] 1 All E. R. 46, that where a mortgaged property is assigned and the assignee becomes bankrupt, so that the equity of redemption is vested in his trustee in bankruptcy, then the trustee must be made respondent to the mortgagee's application to exercise his remedies as mortgagee.

Later, Farwell, J., laid down several propositions:—

(1) Where the equity of redemption has been assigned, and the original mortgagor is not seeking relief against his personal obligation to pay the mortgage moneys, he is not entitled to claim relief under the 1939 Act.

(2) The fact that the assignee of the equity is under an obligation to the assignor to discharge the mortgage moneys does not make him *vis-à-vis* the mortgagee "the person liable to perform the obligation", where the mortgagee is seeking leave to enforce his remedies.

(3) The assignee of the equity is not a necessary party to an

application by a mortgagee for leave to enforce his remedies. This last ruling, of course, definitely overrode the *Hearts of Oak* decision, *supra*.

(4) Such applications must be made *ex parte*.

These propositions were laid down by Farwell, J., in *Re Woolwich Equitable Building Society*, [1942] Ch. 253; [1942] 1 All E. R. 284, and the view taken by him was adopted by the Court of Appeal in *Re Leicester, etc., Building Society*, [1941] 2 All E. R. 36.

Another case in which the 1939 Act did not assist a person who would be substantially affected by the exercise by a mortgagee of his remedies was the case in which the mortgagor was merely a nominee. It was laid down that the beneficial owner of the mortgaged property, not being " liable to perform " the mortgage obligation, need not, and indeed could not, be joined as respondent in a mortgagee's application for leave to exercise his remedies: *Re Royal Mutual Building Society*, [1942] 1 All E. R. 578.

It will be seen that section 1 (1) of the 1942 Act sweeps away all such difficulties. However, it would obviously be impossible for the mortgagee to select, or even to know all the persons who might be " affected " by the exercise of his remedies. Accordingly, it was provided by section 1 (2) that the mortgagee is not required to make all the persons so affected parties to his application. The position was left to be dealt with by rules, and although the Act only became law on October 22, 1942, rules had been prepared meanwhile and were brought into effect on the day on which the Amendment Act became law.

New Rules.

Two sets of rules were made. The High Court Rules (by S. R. & O., No. 2163/L.32 of 1942) and the County Court Rules (by S. R. & O., No. 2164/L.33 of 1942). These rules are on rather similar lines, and it will suffice to refer to the High Court Rules, the effect of which is as follows:—

(1) The appropriate Court for the giving of the leave required for instituting proceedings for " the recovery of mortgaged property " (which really means the recovery of possession of mortgaged property) is to be the Court in which the proceedings are sought to be instituted (rule 1).

(2) An application for leave to institute proceedings for the recovery of possession of mortgaged property is to be by originating summons (rule 2).

(3) Subject to paragraph 4 (below) certain persons are (by rule 4) to be made respondents to an application by a mortgagee for leave to exercise his rights or remedies " against the property ". No doubt, the sale or taking of possession of mortgaged property is the exercise of a right or remedy " against the property ". One might suppose that the appointment of a receiver is also the exercise of such a right or remedy, but possibly this point is a debatable one. However, in this respect the rule follows the wording of the 1942 Act, and if any question arises it is the Act, and not this rule, which must be criticised. Even

under the C. (E. P.) Act, 1939, s. 1 (2) (a) (ii), it was necessary to obtain leave before appointing a receiver under a mortgage; but the point raised here is addressed to the question whether this new rule concerning the adding of parties as respondents applies to an application for leave to exercise any right or remedy available by way of the appointment of a receiver.

Where rule 4 applies the respondents are to be:—

(a) The original mortgagor (whether under personal liability or not) if owning the equity of redemption.

(b) The assignee of the equity, if the equity has been assigned, (whether he is under personal liability or not).

(c) If the mortgagor or assignee is dead his personal representative; but if the mortgagor or assignee has been dead more than six months and no personal representative has been constituted, application may be made *ex parte*.

(d) The trustee if the equity of redemption is vested in a trustee, but the application may be made *ex parte* if the trustee (including a trustee in bankruptcy) has already given to the applicant a written statement that he has no objection to the leave being given.

(4) There might, of course, be other persons known to be affected by the exercise of the mortgagee's rights or remedies. To meet this possibility, the applicant, on applying at chambers for an appointment to hear the application, is to leave at chambers with a copy of the summons, a statement showing the name of such person and his interest in the mortgaged property, and the Court can then direct that such person or *any other person* who would, in the opinion of the Court, be affected shall be added as a respondent.

What is the applicant to do if he is uncertain what persons *will* be affected? This possibility is neatly covered by a provision that he may apply *ex parte*, and on applying for an appointment (as last mentioned) he is to leave at chambers a statement showing the names of the persons who in his opinion may be affected and their interests, and the Court may then direct which, if any, of those persons are to be made respondents (rule 4).

(5) If persons have to be added as respondents it will not be necessary to amend the summons. The original summons and the copy served are to be endorsed with a notice in the form set forth in these new rules.

Leave before Action.

The amendments of the C. (E. P.) Acts to prevent the institution of proceedings without leave remain to be considered in greater detail.

(1) Section 1 (2) of the C. (E. P.) Act, 1939, is amended by adding at the end of paragraph (b) the words " or institute proceedings for the recovery of possession of mortgaged property ". The result is that, subject to the provisions of that section, no person is entitled without obtaining the leave of the Court to commence proceedings for the recovery of possession of mortgaged property. The result is, of course, that the Court can consider, when an application for leave to take

possession is made, whether the person who is actually or notionally liable to pay the mortgage debt or to perform the mortgage obligation is unable to do so (*i.e.*, having regard to his other obligations, if any) owing to the war, and if satisfied upon that point the Court can refuse leave or give leave subject to such restrictions and conditions as it may think proper: C. (E. P.) Act, 1939, s. 1 (4).

By virtue of the last few words of paragraph (d) above mentioned (" or for the recovery of possession of land ") it was unnecessary to obtain leave to *commence* proceedings to take possession of land. Accordingly those words are now cancelled: C. (E. P.) Act, 1942, s. 2 (1) (a).

(2) On the other hand, by section 1 (3) of the C. (E. P.) Act, 1939 (as amended by the 1940 Act), no one was permitted without the leave of the Court to enforce any judgment or order

(a) for the recovery of possession of land by a mortgagee thereof by reason of a default in the payment of money; or

(b) for the delivery of *any property other than land* by reason of a default in the payment of money.

Now, if the mortgagee has got over all the stiles in the Possession of Mortgaged Land (E. P.) Act, 1939, and has obtained leave to commence proceedings without any condition as to the enforcement of the order, he will not be troubled by (a) or (b) above, for (a) is now completely deleted, and as to (b), the words italicised above (" any property other than land ") are deleted and (b) is now to read " for the delivery of any property *other than mortgaged property* by reason of a default in the payment of money ".

War-time Mortgages.

Similar amendments are made in section 26 of the Liabilities (War-Time Adjustment) Act, 1941. Therefore, it does not matter whether the mortgage is made before or after the beginning of the war. Leave must be obtained before a mortgagee commences proceedings for possession, but if the Court does not attach conditions concerning the enforcement of the order when granting leave to start the proceedings the mortgagee will not need to obtain leave to enforce the order for possession when it is made.

It will, however, be recalled that if the mortgage was made *after* the war began the party applying for relief will have to show not only that his inability to pay is due to circumstances attributable to the war, but also that the circumstances on which he relies arose after the mortgage, or the contract to grant it, was made.

CORRIGENDUM.

Vol. 6, page 376, clause 6, lines 2 and 3: *for* " concerned to entitled " *read* " concerned or entitled ".

THE LIBRARY.

A Practical Epitome of the Death Duties. By David Harrison, LL.D., of the Estate Duty Office. London: Sweet & Maxwell, Ltd. and 347 pp. £1 1s. net.

This book is well named. It *is* practical and, despite its 347 pages, it *is* an epitome. The author, from his position in the Estate Duty Office, knows what the busy practitioner needs. He explains the principles with an eye always to the practical side. At the same time he does not claim the book to be an exhaustive treatise; it is a statement of the main principles governing the law and practice of the various duties, with illustrations of their practical application. In the avoidance of all but essential detail, the author does at times tantalise the reader. One imagines that one is about to obtain "a pass" into the inner sanctum of the officials of the Inland Revenue—but then the guide turns back before opening the door which bars the way to those "official secrets". However, the intelligent reader will glean much useful information from the peep which he is allowed through the key-hole. He will be able, not only to carry out the necessary procedure and supply the required information on almost any practical problem that may arise in connection with Death Duties, but also to anticipate, to a great extent, the view which will be taken of that problem by those who have to make a decision upon it.

The law on the subject is arranged and presented in an admirable form—accessible for the practitioner who requires a reference book, pleasurably readable for the student or the studious practitioner. The author maintains the general division of the duties into two classes—mutation duties (*i.e.*, estate duty), charged on property conceived as changing hands on death, and acquisition duties (*i.e.*, legacy duty and succession duty), charged on the benefits arising to others on the death of the deceased person. So logical is the author's development of this theme that one could wish that he be given a free hand in re-drafting the existing legislative labyrinth which has been constructed around the three basic statutes—the Finance Act, 1894, the Legacy Duty Act, 1796, and the Succession Duty Act, 1853. Some of the avenues recently added to that labyrinth are explored by the author for the benefit of the practitioner. For example, one is led comfortably by the hand through the well-nigh impenetrable paths of section 43 of the Finance Act, 1940, which preserves estate duty on a life interest dealt with during life so that the property would not otherwise be deemed to pass on death of the life tenant; through the twists and turns of section 46 of the same Act, by which estate duty is payable in respect of the assets of any company to which the deceased has transferred property during his life.

It is indeed of the greatest value to have an up-to-date text-book on such an intricate subject, both in law and in practice. Its value is enhanced by apt quotations from recent judgments, the use of recent cases as illustrations, the notes on war-time procedure (giving even the address to which to send documents) and the chapter entitled "Persons Killed in War, etc." (giving addresses to which applications for recommendations to the Treasury for relief should be made). These examples prove the practical value of the book in minor detail, but in addition the reader will discover valuable material on the major practical problems—such old friends as the valuation of the deceased's shares in a private company, provisional agreements with the district valuer in real property matters, the forms of account to use and the way to use them for legacy duties and succession duties, the valuation of annuities, the composition and commutation of duties, etc.

It is, in short, a book which will become well thumb-marked in any general practitioner's office.

CORRESPONDENCE.

With reference to correspondence on p. 306 of Vol. 6 and to Form 13 in that volume we have received a communication from The Law Society and by their courtesy have been permitted to reprint below an article in the *Law Society's Gazette* for November, 1942:—

WAR DAMAGE ACT, 1941.

CONTRACT FOR SALE OF DAMAGED PREMISES—ASSIGNMENT OF VALUE PAYMENT.

It will be remembered that section 9 (7) of the War Damage Act, 1941, provides (*inter alia*) that an assignment in whole or in part of any payment, or share of any payment, in respect of war damage under Part I of the Act, shall be of no effect until it has been approved in writing by the War Damage Commission. An exception is made in favour of an assignment which does not affect any beneficial interest in the payment or share or in any part thereof, and members will recall that the Commission have stated that an assignment of a value payment, etc., in a case falling within section 46 (3) of the Act (*i.e.*, where the damage occurs after the signing of a contract for sale and before completion) is within the terms of the exception (see the GAZETTE for February, 1942, at p. 17).

Not infrequently, however, parties who contract for the sale and purchase of property after it has suffered damage wish to make any value payment that may attach to the vendor's proprietary interest a part of the subject-matter of the sale. In such a case, the written approval of the Commission is required to render effective the assignment of the payment to the purchaser. As there appears to have been some uncertainty as to the procedure that should be followed in obtaining the Commission's approval, the Council have made inquiries of the Commission, from whom the following letter has now been received:—

"I have to refer to your letter of the 14th August and previous correspondence with reference to the procedure of the Commission in the consideration of application for their approval of assignments under section 9 (7) of the War Damage Act.

"The Sub-section provides that an assignment shall be of no effect until it has been approved in writing by the Commission, and the Commission, before giving their formal approval, require to be satisfied not merely that the arrangement is one which they would be prepared to approve, but also that there has been a transaction which when approved will operate as an effective assignment.

"It is not, however, required that the document effecting the assignment shall have been completed before the Commission are approached and asked for their approval. On the contrary the Commission are prepared in every case to consider, before the deed of assignment is drafted, whether the circumstances are such as would enable them to give their approval of the arrangement which the parties desire to make. Where a draft deed is submitted which calls for no observations on the part of the Commission, the Commission will agree to give their formal approval upon being informed that the deed has been completed.

"The preparation of the document by which an assignment is to be effected is a matter for the parties' solicitors, and it is not the function of the Commission to advise as to the terms of the document. The only concern of the Commission is to see that *prima facie* the deed constitutes an effective assignment, and that the provisions are such as it would be proper to approve. In the course of the examination of a draft suggestions may be made as to the correctness of any references to the provisions of the War Damage Acts, and drafting amendments may also be suggested for the purpose of removing doubts as to the efficacy of the operative part of the assignment. When approval is given, it is customary to add that the approval does not otherwise affect the validity of the assignment, or admit the title of the assignor to any payment to be made."

It should not be assumed, however, that the Commission will in every case give the approval readily; and in fact the Commission has stated on a previous occasion (see the GAZETTE for August, 1941, at p. 120) that such approval will only be given in exceptional

circumstances. Where it is desired that, if possible, the purchaser shall receive any value payment that may be made, it will therefore be advisable, besides following the procedure set out above, to provide in the contract for the contingency of the Commission's refusing to approve the assignment of the payment. This could be effected by providing:—

(1) that the contract shall be conditional on the Commission's giving its approval within a specified time; and

(2) that the deposit shall be placed in the joint names of the vendor and the purchaser or their solicitors, and shall be returnable to the purchaser if the Commission's approval is not so given.

NOTICES TO QUIT FOLLOWING SALES OF AGRICULTURAL LAND.

Landowners and farmers in England and Wales are again reminded that under a Defence Regulation made on November 11, 1941, where agricultural land has been purchased since the outbreak of war, any notice to quit given by the purchaser to a tenant is null and void, unless the Minister of Agriculture and Fisheries consents in writing thereto. The Regulation applies whatever the reason for purchase, and therefore includes cases where a farmer has purchased land and has given or intends to give notice to quit in order that he may occupy the land himself. Although the Minister is empowered to give consent either before or after the notice to quit is served he will not be prepared in future, unless the circumstances are exceptional, to consider giving his consent in any case in which the application is made later than one month from the date of the service of the notice to quit. As regards notices already served, application should be made before December 31, 1942.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Vendor and purchaser—damages for failure to complete—existence of mortgage known to the purchaser.—Thomas v. *Kensington*, [1942] 2 K. B. 181, carries *Re Daniel*, [1917] 2 Ch. 405, just one step farther. In the case noted the purchaser knew at the time of the contract that the property was in mortgage, and Stable, J., held that this knowledge did not limit the damages recoverable for failure to complete to the damages recoverable under the rule in *Bain* v. *Fothergill*, L. R. 7 H. L. 158. If the vendor was prevented by the existence of the mortgage from completing his sale this was not failure due to a defect of title and damages for loss of bargain could be recovered.

Mortgage—option to purchase in lease—right to redeem freehold reversion with lease.—The decision in *Nelson* v. *Hannam*, [1942] 2

All E. R. 508, is perhaps more remarkable that the proceedings were brought than that the learned Judge should have decided as he did. The proceedings arose on an application by the defendants in a foreclosure action. The defendants were lessees whose lease contained an option to purchase at a fixed sum. The defendants then mortgaged the property, and on the same date the option to purchase was assigned to the mortgagee. Subsequently, the freeholder conveyed to the mortgagee the reversion for the sum fixed by the option. The defendants, in a foreclosure action brought by the mortgagee, applied not only for redemption of the term but also for a declaration of the right to have the freehold conveyed on the payment of the fixed amount. It should be added that the foreclosure proceedings were started on March 4, 1941, and the conveyance to the mortgagee was dated March 25, 1941, being the last day on which the option could be exercised under the lease.

According to the report no cases were cited in argument or by the learned Judge, and the argument appears from the observations in the judgment to have been based upon the analogy of renewable leaseholds under which a renewed lease could be redeemed under a well recognised principle. The point does not seem to have been taken that the assignment of the option to purchase was by way of collateral security and therefore could only be an assignment by way of charge, and that if exercised the property acquired must be subject to the mortgage. Farwell, J., decided against the defendants and his *ratio decidendi* appears substantially in the following words: "The plaintiff was entitled, in my judgment, to exercise his right. He has committed no fraud on anybody, and there is no hardship on the defendants by his acquiring from the corporation, if he could, the freehold reversion of the property. That he has acquired, but that does not give the defendants a right to have the freehold reversion conveyed to them even by payment of the amount which the mortgagee has had to pay the corporation".

Easement — acquisition by prescription — user clam — change in character of dominant tenement.—Lloyds Bank v. *Dalton*, [1942] 2 All E. R. 352, does not introduce any new principles but affords a good illustration of the problems arising from acquisition by prescription. The facts are too complicated for a note adequately to set them out, and it must be borne in mind that in all these cases the facts and the whole facts are essential to the decision. Shortly it was a claim for damages arising from an alleged breach of the easement of support and the breach arose from the demolition of buildings on the servient land, thereby causing damage by subsidence to the dominant tenement. The damage was enhanced because water closets on the dominant land became unusable and had to be replaced. It was admitted that the property had existed in this state for the requisite period of prescription, but it was alleged (a) that the user had been clam, and (b) that the water closets had taken the place of earth closets during the period of

prescription so that time had not run. The basis of the claim that the user had been clam was that neither from the highway nor from any other place to which the public had access was it possible to see any part of the plaintiff's property or outbuildings for which prescription was claimed. Bennett, J., decided against the defendants on both these issues. With regard to the first issue he relied upon the *ratio decidendi* in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, and *Union Lighterage Co.* v. *London Graving Dock*, [1902] 2 Ch. 557, namely, that acquisition was open if it was of such a character that "an ordinary owner of the land [the servient tenement], diligent in the protection of his interests, would have, or must have been taken to have, a reasonable opportunity of becoming aware of that enjoyment". Applying this principle the learned Judge held as a fact that the owner in the particular circumstances could have known of the existence of this support by one building for the other. Obviously every case must depend on its particular circumstances and beyond this principle it is not possible to go. In *Union Lighterage Co.* v. *London Graving Dock* (*supra*), the claim was based on underground rods which were concealed from any ordinary inspection of the property.

The second issue again was really one of fact. It was argued that the change from earth closets to water closets increased the burden on the servient tenement and, therefore, no claim to prescription could lie. The learned Judge held that without water closets the premises were uninhabitable and hence there was loss, having previously pointed out that not every change in the dominant tenement could break the period of prescription. He gave certain examples : "the substitution of a new chimney-pot for an old one, the installation of a new hot-water system into an old house, the provision of a new bath for an old one". In his view it was to some extent a question of degree, and if the changes threw a substantially greater weight upon the servient tenement the action might not lie.

It will be noticed that in this case the learned Judge did not rely upon a change in social habits but upon the fact that changes by repairing or renewing did not increase the weight to be supported. In this respect the case does not seem to go as far as *Lock* v. *Abercester*, [1939] Ch. 861 (a decision of the same learned Judge), where it was held that a way for horse-drawn vehicles acquired by prescription included under changed conditions mechanically-propelled vehicles.

Hire-purchase—seizure without leave under Emergency Legislation—action for damages.—Carr v. *Broderick & Co.*, [1942] 2 All E. R. 441, is a decision of some importance. Goods sold under a hire-purchase agreement were taken without leave obtained under the Courts (Emergency Powers) Act under an agreement signed on behalf of the hirer, though on the evidence it would appear that the agreement was signed under a mistaken notion of the object of the agreement. Action was subsequently brought by the hirers on a claim in detinue or alternatively in conversion apparently with the object of recovering

possession. Goddard, L.J. (sitting as an additional Judge), held that no action lay on either of these pleas because plaintiff had no right to possession since default in paying instalments had been made, though she could only be deprived of possession properly by an action. The distinction here drawn seems to be a very fine one. The hirers were in lawful possession and could not be deprived lawfully of possession without obtaining leave of the Court, in this case both under the Hire-Purchase Act, 1938, and under the Courts (Emergency Powers) Acts. As they did obtain possession with leave of the plaintiff apparently because they were the owners of the chattels in law the Court, according to this decision, cannot direct that possession should be redelivered. Under the Hire-Purchase Act, 1938, the learned Judge held that only an action for money had and received lies to recover all the money paid. Similarly, he was of opinion that under the Courts (Emergency Powers) Act only an action "in the nature of an action on the case for damages" will lie, and that in default of pleading any damage the damage recoverable is the amount of the instalments paid. The learned Lord Justice allowed amendment of the pleadings and awarded the amount of the instalments paid, but made no order as to costs. The form of the pleading suggested by the learned Lord Justice is set out in the report.

It should be pointed out that there is no suggestion that under the Courts (Emergency Powers) Acts further damages could not be allowed if pleaded and proved, though the learned Judge did suggest that so far as concerns the loss of the goods no other damages could be recovered under the Hire-Purchase Act, 1938. This is worthy of consideration in these days of rapidly rising prices and scarcity of certain forms of goods.

Emergency Legislation—notice of proceedings for leave to realise security.—A short practice point was before Uthwatt, J., in *Citizens Permanent Building Society* v. *Inglefield*, [1942] 2 All E. R. 424, where the learned Judge held that if a mortgagor has left the mortgaged premises vacant and his whereabouts could not be ascertained he would give leave under the Courts (Emergency Powers) Rules, reg. 15 (5) to serve notice under the summons by posting it on the door of the dwelling-house, and he further ordered that the return day should be three weeks from the date of posting. He further made the order only on an undertaking that the mortgagor was not to be sued on the personal covenant, and if the mortgagee obtained leave to realise the security the mortgagor was to be released from all personal obligations under the mortgage.

Rule in Shelley's Case—construction excluding the rule.—Although the rule in *Shelley's Case* has been abolished by the Law of Property Act, 1925, s. 131, this case is an interesting illustration of the fact that the learning on the subject is by no means dead. In *Re Routledge*, [1942] 2 All E. R. 418, the question arose under the will of a testator

who died in 1874. A little arithmetic will promptly show how long it is likely to be before conveyancers called upon to construe wills can altogether dispense with a knowledge of the rule. If we say half a century from 1925 we shall hardly be on the safe side and 1975 still seems a good long way off.

In point of fact the manner in which the rule has been abolished does not help to abolish the learning, because even in instruments taking effect after 1925 where the rule would otherwise have applied a statutory interpretation of the effect of the gift is provided. To this we will return remarking only that it may be necessary to decide whether the rule would have applied in order to determine whether or not the statute now applies. Too many young lawyers have been misled into believing that the rule has no further importance but belongs to the dead past.

In *Re Routledge* (*supra*) the relevant limitation was contained in a will and ran as follows after a devise to trustees upon trust to pay such rents and profits to W. T. Routledge for life and after his death "to the use of the heirs male of the body of the said W. T. Routledge living at his decease his heirs and assigns for ever and failing such issue" a gift over. Bennett, J., held that the rule in *Shelley's Case* did not apply, that the words "heirs male of the body" were to be construed as words of purchase, and that a male claiming through a female was the person designated and should take a fee simple. It should be noted at once that the beneficiary was (i) the heir of W. T. Routledge, (ii) he was an heir of the body of W. T. Routledge, and (iii) he was a male, but (iv) he was not the heir male of the body of W. T. Routledge because he claimed through a daughter and not a son.

On the face of the limitation W. T. Routledge took an equitable interest for life, since there was an active trust, but the heir would take a legal interest since the limitation was to trustees to the use of the heir. It is not clear from the report why, but probably owing to mortgages, in fact the heir took an equitable interest also. Had it been otherwise the rule in *Shelley's Case* could not in any case have applied: see *Re Hobbs*, [1917] 1 Ch. 569. But no argument appears to have been addressed to the Court on the other point that if the limitation in form gave an equitable interest to the ancestor and a legal interest to the heir the rule could not apply. It seems to have been accepted without question that the decision in *Re White and Hindle's Contract*, 7 Ch. D. 201, was correct notwithstanding *Coape* v. *Arnold*, 4 De G. M. & G., at p. 587 (see Challis' R. P., p. 165).

The essential ground upon which the learned Judge decided that the words were words of purchase lay in the distinction drawn in *Van Grutten* v. *Foxwell*, [1897] [A. C. 658. If the word "heirs" on the construction of the will as a whole is used to designate a particular person it must be so construed and the rule is excluded, but if the word "heirs" is used in its technical meaning, whatever the intention of the testator to confer only a life interest on the ancestor, the rule applies. The distinction was very clearly drawn in *Lightfoot* v. *Mayberry*, [1914] A. C., at p. 806, where the "nearest male heir" was not

within the rule, when it was said : " The justification for ascribing rigorously to a term of art its technical meaning rests upon the reasoning that the fact that that special term has been chosen makes it probable that it was intended to have its technical meaning. The force of this reasoning disappears when that which is used is not the term of art but something which is different even though grammatically considered it might appear to be substantially equivalent "; but cp. *Silcocks* v. *Silcocks*, [1916] 1 Ch. 276; *Re Hammond*, [1924] 2 Ch. 347. It will be noticed, however, that in *Re Routledge* (*supra*) the words used were exactly the words of art. Here, however, the words of art may still be shown by context not to have their " probable " intention referred to above, but the explanatory context may exclude their employment of terms of art : *Re Hussey and Green's Contract*, [1921] 1 Ch. 566. As it was explained in *Silcocks* v. *Silcocks* (*supra*), where " male heir for ever " was held to be within the rule, the words used there showed an intention to create an entail and so the words were really words of limitation intending the estate to pass on and on to the heirs by descent of the body. In *Re Routledge* (*supra*) the addition of the words " his heirs and assigns for ever " either excluded the intention to create an entail or were meaningless. Furthermore, the heirs of the body were to be ascertained at one particular point of time, namely, the decease of W. T. Routledge, thus indicating that not the whole class of heirs of the body were in contemplation. This decision is, therefore, of value in emphasising the importance of first construing by reference to the context of the document the intention of the testator in the use of the words.

In holding that the beneficiary was entitled despite the fact that he claimed through a female and was not, therefore, the heir male of the body within the acceptance of the rules governing entails, the learned Judge followed a passage in Co. Lit., f. 24b, where it is laid down that where the heir takes by purchase the Statute De Donis " cannot work thereupon ". Since the beneficiary was on the facts both the heir of the body and a male the question could easily be decided. There may be another case in which the difficulty could not be so simply resolved, which is mentioned in Co. Lit., f. 24b, namely, where the legal heir does not combine both descriptions. Coke gives as an example the illustration of a limitation to a daughter and a remainder to the heirs female of her father, the father also leaving a son. The son would be heir, so the daughter could not get an entail, but a life estate only. This, no doubt, is an improbable limitation, but if the purchaser heir under such a limitation as the one in *Re Routledge* (*supra*) could be a collateral as well as a lineal heir doubt might easily arise. So, for example, if the words " of the body " had not appeared and the rule had been excluded, then if W. T. Routledge had heirs surviving the daughter of a brother and the son of a sister, it would seem that neither could take. One would be the heir but not a male and the other would be a male but not the heir. This principle of Coke appears to have been accepted as law, though it was not necessary to apply it, in *Lightfoot* v. *Mayberry* (*supra*).

The point is by no means academic, because section 131 of the Law of Property Act, 1925, provides that "in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act". The width of these words may be sufficient to exclude any consideration of whether or not the rule in *Shelley's Case* would have applied and it may be a statutory interpretation of the word "heir" etc. whatever the context, though this view may seem sufficiently alarming, but it is quite clear that it gives a much enhanced importance to the old rules for construing the term "heir" when it is used as a word of purchase. It seems not impossible that the general intention of the testator may in some instances be wholly defeated having regard to the modern rules for the distribution of intestates' estates. Both the rule in *Shelley's Case* and section 131 seem to warrant rather more attention than they have received since the passing of the Law of Property Act, 1925.

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2. *WILL CASES.*

By R. E. MEGARRY.

Construction—gift to "M. and/or J."—Re Lewis, Goronwy v. *Richards*, [1942] Ch. 424; 111 L. J. Ch. 256, is a decision on a testamentary provision unlikely to be found outside a home-made will. A testator made a residuary gift "to Margaret Ann Richards and/or John Richards". Farwell, J., said that "It may be an absolute gift to Margaret Ann, and, if she does not survive the testator, then to John Richards, or it may be a gift to them jointly, or it may be wholly void". He held that the gift was not void for uncertainty, for the Court had to put a meaning on the phrase if possible. "The expression 'and/or' is unfortunate. I do not think I have met it before in a will, and I hope I shall never meet it again." Accordingly he took the view that Margaret and John were intended to take as joint tenants but that if Margaret had not survived the testator, John was to take by substitution. As, however, both survived the testator, it was held that they took as joint tenants.

Charities—cy-près doctrine.—Re Tharp, Longrigg v. *The People's Dispensary for Sick Animals of the Poor, Incorporated, and Others*, [1942] 2 All E. R. 358, serves rather to illustrate the settled law than to lay down any new doctrines. A testatrix gave a share of her residuary estate to "The Jerusalem Society for the Prevention of Cruelty to Animals of Jerusalem, Syria". A body named "The Society for the Prevention of Cruelty to Animals, Jerusalem Branch" had once existed and had received subscriptions from the testatrix, but had become

defunct some time before she died, its work being taken over by another society of a different name. Bennett, J., had little difficulty in holding that the gift had lapsed, for it was a gift to a named society which had ceased to exist, and not a gift for a general charitable purpose. Another share of residue was given to "The Tangier Society for the Prevention of Cruelty to Animals". No such society appears to have existed, and it was held that the People's Dispensary for Sick Animals of the Poor, Incorporated (to which, under an abbreviated title, the will had already given a share of residue), could not claim the gift, despite the work for animal welfare it had carried on in Tangier. Further, as the attempted gift was to a specified society rather than for a charitable purpose and the will contained no indication of any other intention, it was held that there was no such general charitable intent as would warrant the application of the so-called *cy-près* doctrine. Both shares of residue therefore lapsed. Possibly the most interesting feature of the decision is its indication in the construction put on the second gift that the Courts are less willing to-day to find a general charitable intent than they were in the days of *Re Harwood*, *Coleman* v. *Innes*, [1936] Ch. 285; 105 L. J. Ch. 142, and *Re Knox*, *Fleming* v. *Carmichael*, [1937] Ch. 109; 106 L. J. Ch. 97.

3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Assignee of lease—construction of express covenant to remain liable for rent during residue of term.—In *J. Lyons & Co., Ltd.* v. *Knowles* (1942), 58 T. L. R. 387, a lease contained a covenant by the lessee not to assign or under-let without licence, with a further provision that every assignment or under-lease should contain a covenant by the assignee or underlessee directly with the lessor to observe and perform the covenants and conditions reserved by and contained in the lease, including a covenant not to further assign or under-let without such consent, and in case of an assignment to pay the rents reserved by the lease. In due course the lessee assigned with the lessor's consent to the defendant, and the deed of licence contained a covenant by the defendant that he would during the residue of the term pay the rent and observe and perform the covenants and conditions contained in the lease. Later the defendant assigned over to a limited liability company and again the deed of licence contained a covenant in identical terms by the assignee.

The company defaulted and the lessor claimed from the defendant rent which had accrued due after the date of the assignment over to the company. The defendant contended that the covenant, similar to his own, in the licence whereunder he assigned to the company impliedly released him from the obligation, there being in his view a novation substituting the liability of the company for his own. No authority for this could be found in any landlord and tenant cases, but reference

was made to certain cases on the law of partnership, such as *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255, at pp. 260, 261, and cases on the law of contracts.

Asquith, J., rejected this contention and held that the covenant expressed the object of binding each and all of the successive assigns by the covenants, including the covenant to pay the rent, during the whole residue of the term.

Indeed, this seems to be the clear intention of the covenant, which surely is deliberately aimed at avoiding the mere substitution of one liability for another. In the ordinary way the assignee is liable to the lessor only by privity of estate, and by assigning over he gets rid of this liability to the assignee: *Beardman* v. *Wilson* (1868), L. R. 4 C. P. 57, and other cases cited in Woodfall, 24th edition, at p. 846. The intention of the covenant here is clearly to avoid this substitution and preserve the obligation of each successive assignee by making him covenant direct with the lessor for payment of the rent and performance of the covenants *for the residue of the term.*

In the same way the effect of the usual covenant of the assignee with the assignor, which is one of indemnity, may be varied by the express terms of a covenant, which may be so worded as to be absolute and not merely one of indemnity: *Butler Estates Co., Ltd.* v. *Bean* (1941), 165 L. T. 197; 57 T. L. R. 666; compare also *Wolveridge* v. *Steward* (1833), 1 C. & M. 644.

(Woodfall, 24th ed., pp. 846–7; 1 K. & E., p. 621.)

Option to purchase freehold reversion exercised by foreclosing mortgagee of leasehold—mortgagor not entitled to conveyance of freehold upon redemption.—An interesting point as to the nature of the lessee's right under an option to purchase the reversion arose in *Nelson* v. *Hannam* (1942), 59 T. L. R. 9.

A building lease contained an option to the lessees to purchase the freehold reversion on giving six months' notice to the lessor before March 25, 1941, and paying a fixed sum. In 1937 the lessees mortgaged the property and assigned to the mortgagee the right to exercise this option. On March 4, 1941, the mortgagee took out a foreclosure summons against the lessees. On March 25, 1941, the lessor conveyed the property to the mortgagee on payment of the sum mentioned in the option clause. Later a foreclosure order *nisi* was made and the date of redemption fixed at May, 1942, this being later extended to July 7, 1942. The mortgagor then took out a summons for a further enlargement of the time for redemption and asking for a declaration that, on redemption of the mortgaged premises and payment of the purchase price of the freehold reversion with interest thereon, the lessees were entitled to require a conveyance of the freehold reversion to the mortgaged property.

Farwell, J., refused this declaration. The lessees did not exercise their option and, he said, on the last day on which they could have exercised it the lessor appears to have conveyed the property to the

mortgagee. The learned Judge took the view that the mortgagee had committed no fraud on anybody, and no hardship was worked on the lessees. Their option expired on that date, and they were not entitled now on paying the purchase money to acquire the freehold.

It is interesting to note how this case fits into the general law regarding options to purchase the reversion. Farwell, J., rejected the contention which was put forward that this case came within the principle of decisions where it has been held that an option to renew exercised by the mortgagee may be for the benefit of the mortgagor, and that on reconveyance on redemption the renewed term is included. Actually there is a fundamental difference in nature between an option for renewal and an option to purchase. An option for renewal is in every sense a term of, and part of, the contract of tenancy. It runs with the land: *Isteed* v. *Stoneley* (1580), 1 Anderson 82; *Muller* v. *Trafford*, [1901] 1 Ch. 54, at p. 60. An option to purchase the reversion is not really part of the contract of tenancy but a collateral agreement: *Sherwood* v. *Tucker*, [1924] 2 Ch. 440; and it does not run with the land: *Woodall* v. *Clifton*, [1905] 2 Ch. 257. So here the option was assigned separately to the mortgagee. Of course it was assigned as security, and the mortgagor, upon redeeming before the option ran out, would have been entitled to have it revested in him. Perhaps, again, if the mortgagee had hastened to exercise the option before the time for its exercise ran out, the position of the mortgagee upon redeeming would have been different. But here the mortgagee waited until the option expired and then, by agreement with the lessor, purchased the reversion. The transaction does not appear to have been in pursuance of the option at all; it appears to have been such a sale as the lessor might have made to anyone interested in purchasing upon expiration of the option.

(Woodfall, 24th ed., pp. 557, 560, 1005; 1 K. & E., pp. 960, 1044.)

Building lease—completion of buildings prevented by the war—lease not frustrated.—The principle that a lease, being a conveyance of an interest in land, cannot be regarded as frustrated by the war, has received another illustration in the case of *Leighton's Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd.* (1942), 59 T. L. R. 27.

In this case the lessees under a building lease agreed to erect a number of shops on the land leased. Before these were completed (and before the stipulated date for their erection) the war started, and building restrictions and other difficulties rendered it impossible for the time being for the lessees to carry out their contract to build the shops. Sued for rent, the defendants pleaded that the contract as a whole was frustrated. They contended that the demise of land was a mere incident in a commercial venture, which was frustrated by the war.

Asquith, J., rejected this view. The instrument was a lease, whatever its ulterior or broader objects. The principle laid down in *Matthey* v. *Curling*, [1922] 2 A. C. 180; *London and Northern Estates*

v. *Schlesinger*, [1916] 1 K. B. 20; *Whitehall Court* v. *Ettlinger*, [1920] 1 K. B. 680; and *Swift* v. *Macbean*, [1942] 1 K. B. 375, therefore applied to a building lease as it did to any other kind of lease, and the doctrine of frustration had no application.

(Woodfall, 24th edition, p. 342; Supplement No. 3, p. 8.)

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4. *DEATH DUTY CASES.*

By Leonard Stein, Barrister-at-Law.

Estate duty — aggregation — whether deceased had an interest — Finance Act, 1894, *s.* 4.—The proviso to section 4 of the Finance Act, 1894, exempts from aggregation with other property passing on the death of the deceased "any property so passing in which the deceased never had an interest". The wide meaning, in this context, of the word "interest", and the slenderness of the "interest" which will suffice to exclude the application of the proviso, are illustrated by the decision in *Lord Advocate* v. *Tennant*, [1939] A. C. 207, which was concerned with a life policy on his own life taken out and, for a time, kept up, by the deceased, but subsequently settled by him on certain trusts to take effect on his death. It was held by the House of Lords that, even assuming the property passing on the death of the deceased to have been the policy moneys and not the policy, it could still not be said to be property in which the deceased never had an interest. Before the settlement the deceased could have assigned or charged the proceeds of the policy. Even after the settlement he had a contingent interest by way of resulting trust and could have disposed of that interest (for what it might be worth) *inter vivos* or by will. Hence, however true it might be that the policy moneys did not come into existence until the death of the deceased, the case could not be brought within the proviso to section 4. This decision was applied by the Court of Appeal in *Westminster Bank* v. *Att.-Gen.*, [1939] Ch. 610, and an addition to this line of cases has now been provided by *Liberton & Craigmillar Estates* v. *C. I. R.*, [1942] S. C. 402, which illustrates the underlying principle in relation to a different set of facts. The deceased had at one time been the proprietor in fee simple of a certain landed estate and the heir in entail in possession of another. In contemplation of his marriage he had charged both estates with an annuity for his intended wife during widowhood, the charge, so far as the entailed estate was concerned, being in Scots law binding upon future tenants in tail. He had subsequently transferred the free estate to a company. About the same time he had disentailed the other estate and had then proceeded to transfer that property also to the company. On his death it was not disputed that estate duty was chargeable in respect of the widow's annuity under section 2 (1) (d) of the Finance Act, 1894, but a question arose as to aggregation. The property deemed to pass under section 2 (1) (d) is "any annuity or other interest provided by the deceased . . . to the extent of the beneficial interest accruing or arising . . . on the death

of the deceased ". As was pointed out in *Westminster Bank* v. *Att.-Gen.* above, it follows that the property to be considered in a case within section 2 (1) (d) is not the beneficial interest, but the annuity or other interest provided by the deceased, the beneficial interest being merely the measure of the extent to which the annuity or other interest is to be deemed to pass. Accordingly, what the Court of Session had to decide in the *Liberton and Craigmillar Case*, above, was whether it could be said of the annuity that it was property in which the deceased never had an interest. The Court answered this question in the negative. What the deceased had done when he executed the settlement was to give his intended wife, contingently on her surviving him, the future rents and profits of the estates to the extent required to provide the amount of the annuity during her widowhood. So far as the annuity was charged on the estate held by the deceased in fee simple, he clearly had an " interest " within the meaning of section 4. Until the execution of the settlement he was free to dispose of the right to the rents and profits which would arise after his death. Again, if the wife had predeceased him at any time before the transfer of the estate to the company, he would have recovered the rights which had been made over to her contingently on her surviving him, and if, while they were both living, she had disclaimed the annuity, he would likewise have recovered those rights. As to the entailed estate, there was an interval—albeit a short one—between the time when it was disentailed and the time when it was transferred to the company, and during that interval, at all events, the deceased had, for the reasons already given, an " interest " in so much of the annuity as was charged on the property. By this reasoning the Court (Lord Mackay dissenting) arrived at the conclusion that the deceased had an " interest " in the relevant sense and that the property was accordingly not exempt from aggregation.

Estate duty—part of debenture issue cancelled in consideration of tax-free interest on balance—Income Tax Act, 1918, *r.* 23 (2) *of All Schedules Rules.*—The Revenue authorities had no success with their contention in *Gilmour's Trustees* v. *C. I. R.*, [1942] T. R. 201, but it had at least the virtue of novelty. The deceased had been the holder of debenture stock in a private company. In January, 1936, it had been agreed that £25,000 of the stock should be cancelled in consideration of the interest on the balance being paid free of tax—a stipulation which was void by reason of rule 23 (2) of the All Schedules Rules of the Income Tax Act, 1918. The £25,000 stock had been surrendered and cancelled, and thereafter interest on the balance had, in fact, been paid free of tax until the death of the deceased in June, 1939. Estate duty was claimed on the £25,000 stock on the ground " either that the said stock was *in bonis* of the deceased at his death or that the deceased was competent to dispose of it ". This rather surprising contention was based upon rule 23 (2), but it was not made clear by what process of reasoning the Revenue authorities, starting from the indisputable fact that the agreement not to deduct tax in paying the interest was void, arrived

at the conclusion that the debentures cancelled in 1936 fell to be included in the property passing on the death of the deceased more than three years later. The claim to estate duty, in the form in which it had been made, was plainly incapable of being supported. Pressed to explain how the £25,000 stock could be said to have passed on the death of the deceased when it had admittedly ceased to exist, counsel for the Crown shifted his ground, seeking to argue that though the stock itself did not pass, what did pass was a claim to the recovery of the stock or, in the alternative, its equivalent, on the ground that the consideration had wholly failed by reason of a statutory nullity. This claim, it was said, "represented" the stock, which had, therefore, rightly been treated as property passing on the death. The Court was unanimous in firmly rejecting this line of argument. Whether the deceased had any such right of action as had been suggested was—to say the least—open to doubt; but, however that might be, the claim under appeal was a claim to estate duty on the debenture stock, and if it was now desired to claim duty in respect of a different item of property, the Crown must make a fresh start.

Estate duty — life insurance policies — assignment to trustees — premiums paid out of loans by settlor—Finance Act, 1894, *s.* 2 (1) (d).— The decision of the Court of Session (Outer House) in *Lord Advocate* v. *Hamilton's Trustees*, [1942] S. C. 426 (see *The Conveyancer*, Sept., 1941, at p. 78), has been unanimously affirmed by the Inner House. It related to a claim to estate duty in respect of policy moneys payable on a death under a policy originally taken out by the deceased but assigned by him to trustees for the benefit of certain beneficiaries, the premiums falling due after the assignment having been paid by the trustees out of moneys lent to them at interest by the settlor. It is unnecessary to go more fully into the facts, for which reference may be made to the earlier note on this case, but it may be useful—since the questions at issue are of some interest and importance—to draw attention to certain points on which the Inner House agreed with the Lord Ordinary. The main propositions which emerge from the judgments may be summarised as follows. First, where a life policy has been assigned by the deceased to a donee, the case will not be brought within the words "interest . . . purchased or provided by the deceased" in section 2 (1) (d) of the Finance Act, 1894, by reason only of the fact that the policy was originally taken out by the deceased and that before (but not after) the assignment he paid the premiums. If this were sufficient, there would be no point in the provisions relating to life policies contained in sections 2 (1) (c), the effect of which provisions, as explained in *Inzievar Estate, Ltd.* v. *C. I. R.*, [1938] A. C. 402, is that the keeping up of a life policy by the deceased, after an assignment to a donee, will cause the policy moneys to be deemed to pass to an extent corresponding to the proportion borne by the amount of any premiums paid by the deceased *after* the assignment to the whole amount of the premiums paid on the policy. Secondly, where the assignment

was an assignment to trustees, the keeping up of the policy by the trustees will not of itself bring the case within the words "interest . . . purchased or provided by the deceased". It will be necessary to inquire whether the settlor directed the trustees to pay the premiums and provided them with the means of doing so. Thirdly, where the trustees have paid the premiums out of moneys borrowed from the deceased, this will not of itself enable it to be said that the "interest" represented by the policy or the policy moneys was provided by the deceased "in concert or by arrangement with" the trustees. It may be that in such a case the policies could be said to have been kept up by the trustees in concert or by arrangement with the deceased, but that is not enough to satisfy section 2 (1) (d): *Att.-Gen.* v. *Murray*, [1904] 1 K. B. 165. Fourthly, no beneficial interest can be said, within the meaning of section 2 (1) (d), to have accrued or arisen on the death of the deceased in respect of a life policy maturing on the death, if the deceased had made an out-and-out assignment of the policy to trustees for the benefit of named beneficiaries, reserving to himself no power of appointment and retaining no other interest in or control over the policy. The beneficiaries having taken indefeasible vested interests at the date of the assignment, all that happens at the death is that the policy matures and the policy moneys become payable. The death affects the value of the interest, but the nature of the interest remains precisely the same as before, with the result—it was held—that the requirements of section 2 (1) (d) are not satisfied.

Estate duty—settled property—death before attaining vested interest —advances from income of presumptive share—Finance Act, 1894, *ss.* 1, 2 (1) (b), 5 (3).—The material facts in *L. A.* v. *Muir's Trustees*, [1942] T. R. 213, which was decided against the Crown in the Court of Session (Outer House), can be stated quite shortly. Under his father's will the deceased had an interest in a share of the testator's residuary estate. The nature of the interest is described in the judgment as follows: "The trustees were to pay and convey the deceased's share to him on his attaining the age of twenty-five years, at which period, unless otherwise determined by the trustees, in virtue of powers conferred upon them, the deceased's share was to vest in him." The trustees were given power to pay or apply the income of the deceased's presumptive share, or so much of it as they should think fit, to or for the benefit of the deceased, any balance to be accumulated and added to the capital of the share. There were gifts over in the event of the deceased dying before attaining twenty-five. He died before attaining that age, with the result (in the events which happened) that his sister became entitled in possession to the income of the share during her life. He had received during his lifetime substantial payments out of the income of his presumptive share. On these facts, estate duty was claimed under section 1 of the Finance Act, 1894, on the footing that on the death there had been a true passing of the deceased's share of his father's residuary estate. In rejecting this view, the Lord Ordinary (Lord Keith) distinguished the two cases on which

the Crown mainly relied—*Scott* v. *C. I. R.*, [1937] A. C. 174, and *Re Hodson's Settlement*, [1939] Ch. 343 (see note in *The Conveyancer*, March, 1939, at p. 358). He pointed out that in both cases the whole income of the property in question " passed on the death from a certain set of beneficiaries, for whose benefit the income was being applied or accumulated under certain trusts, to an individual who took the whole income ", either (as in *Scott's Case*) as heir in tail in possession or (as in *Hodson's Case*) as the person entitled under the settlement. In both cases it was held that there was none the less a passing under section 1 because the individual who, on the death, became entitled to the income in possession had, before the death, had an interest, but a different and inferior interest, in that income. Hence, in *Muir's Case*, above, a passing under section 1 was not excluded by the circumstance that the sister of the deceased had had, before the death, a contingent interest in the income to which, on the death, she became entitled in possession. What did, in Lord Keith's view, exclude such a passing was the fact that the deceased had not lived to attain a vested interest and had, at his death, a mere *spes successionis*, as distinct from " a real beneficial right ". At the time of the death " there was no real beneficial right in anyone—there was merely a prospective beneficial right in some one of a series of persons ", with the result (it was held) that the essential condition of a passing under section 1 was not satisfied, since it could not be said that the property had changed hands in the sense of passing from one beneficiary, or set of beneficiaries, to another.

Dismissing, on these grounds, the claim to estate duty under section 1, the learned Judge held that there had been a notional passing under section 2 (1) (b), by which property passing on a death is to be deemed to include " property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest ". But a notional passing under section 2 (1) (b), as distinct from a passing under section 1, gave rise to no claim to estate duty, by reason of section 5 (3) of the 1894 Act, which provides that " in the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death ". The interest which ceased on the death of the deceased was an interest in settled property which failed, by reason of his death, before it became an interest in possession, and, the other requirements of the sub-section being satisfied, no claim to estate duty arose.

Estate duty—disclaimer by husband of wife's testamentary gift—Finance Act, 1894, *s.* 5 (2) *and s.* 22 (2) (a)—*Finance Act*, 1914, *s.* 14.—The decision in *Parsons* v. *Att.-Gen.*, [1942] W. N. 126 (see *The Conveyancer*, Sept., 1942, at p. 50) has been affirmed by the Court of Appeal—[1942] 2 All E. R. 496.